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(Cumulative index to Volume 8 included.)

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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*Reed E. Hundt designated Chairman effective November 29, 1993.

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-100

In the Matter of

Amendment of Section 73.202(b), RM-8175
Table of Allotments,
FM Broadcast Stations.
(Cleveland and Ebenezer,
Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 10, 1993; Released: December 13, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2739 (1993), proposing the substitution of Channel 280C3 for Channel 280A at Cleveland, Mississippi, and deletion of Channel 280A at Ebenezer, Mississippi. The *Notice* was issued in response to a petition filed jointly by Radio Cleveland, Inc. ("Radio Cleveland") and James L. Haffey d/b/a JimBar Enterprises ("JimBar"). Radio Cleveland filed comments. Afro-American Broadcasters of Mississippi ("Afro-American Broadcasters") filed comments and an expression of interest for the channel at Ebenezer. Radio Cleveland filed reply comments.

2. As stated in the *Notice*, Channel 280C3 can be allotted to Cleveland provided Channel 280A at Ebenezer is deleted.[1] The *Notice* pointed out, JimBar, permittee of Channel 280A at Ebenezer, requested cancellation of its construction permit for Channel 280A and deletion of the channel. Additionally, the *Notice* stated that in support of this request, JimBar had stated that it determined that Ebenezer, an unincorporated community with a 1984 estimated population of 150, could not feasibly support an FM station in light of current economic conditions.[2] The *Notice* stated that Channel 280A at Ebenezer would be deleted unless comments were filed during the comment cycle in this proceeding stating an intention to file an application for the channel. The *Notice* also stated that should an expression of interest be filed for Channel 280A at Ebenezer, upon termination of this proceeding, a filing window would be opened. Further, should the channel be retained, caution was expressed in the *Notice* that should it appear that there is undue delay in activating the channel in Ebenezer, the Commission would consider a further petition to remove the channel at Ebenezer to accommodate expanded service at Cleveland.

3. Afro-American Broadcasters filed comments requesting retention of Channel 280A in Ebenezer stating its intention to file an application for the channel. Afro-American Broadcasters states that Ebenezer is located just off Interstate Highway 55, a major north-south traffic route. Afro-American Broadcasters does acknowledge that Ebenezer is a small community but contends that a radio station operating in Ebenezer could also serve the nearby communities of Goodman, Durant and Vaughn, Mississippi.[3]

4. Radio Cleveland, in its reply comments, continues to support the proposed upgrade at Cleveland. Radio Cleveland argues that Ebenezer no longer qualifies as a community for allotment purposes and Channel 280A at Ebenezer should be deleted. Radio Cleveland reiterates that JimBar, the original petitioner for the channel at Ebenezer, requested cancellation of its construction permit after it determined that Ebenezer could not support an FM radio station. According to Radio Cleveland, Ebenezer is essentially becoming a "ghost town" with a population of 100 people as shown in the *1992 Rand McNally Commercial Atlas* which is a decrease from the population of 150 people as was listed in the *1987 Atlas*. Radio Cleveland points out that Ebenezer is not listed in the U.S. Census and that it is neither incorporated nor a Census Designated Place. Further, Ebenezer has no local government, school system or local newspaper, all things which would support its status as a community. Ebenezer only has a handful of local business and churches, which, states Radio Cleveland, may in fact serve the wider surrounding rural area. Radio Cleveland does not dispute that Ebenezer does have some of the attributes of a community such as a post office, its own zip code, volunteer fire department and water association but argues that it is not uncommon for sparsely populated rural areas to have such organizations. Radio Cleveland contends that the choice between retention of a channel in Ebenezer or the significant improvement of service at the much larger community of Cleveland compels the deletion of the Ebenezer allotment. Radio Cleveland asserts that Station WCLD-FM, Cleveland, presently serves 40,482 people while the requested upgrade would provide service to 76,687 people, virtually doubling the number of people served. The Ebenezer Class A station, on the other hand, would provide new service to 25,128 people. Radio Cleveland points out that Channel 280A at Ebenezer is short spaced to Station WCLD-FM, Cleveland, as a six kilowatt facility. Thus, the Ebenezer channel would be limited to an effective radiated power of three kilowatts. According to Radio Cleveland, granting the WCLD-FM

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[1] On January 7, 1993, JimBar Enterprises filed a letter with the Commission requesting cancellation of the construction permit for Station WZBR-FM, Ebenezer, Mississippi (BPH-900424ME, BMPH-920116IO). The Commission granted JimBar's request on March 23, 1993.

[2] Channel 280A was allotted to Ebenezer in MM Docket No. 89-324. *See* 5 FCC Rcd 682 (1990). The *Notice* in that proceeding requested JimBar Enterprises ("petitioner"), to provide information to support a finding that Ebenezer qualifies as a community for allotment purposes. Although petitioner provided minimal information, Ebenezer was found to be an identifiable population grouping with businesses and community organizations, including a post office and zip code, which identified with the community.

[3] Goodman (population 1,256 people) and Durant (population 2,838) have a post office, zip code, bank and both communities are incorporated. The populations are taken from the 1990 U.S. Census. We note that there is a proposal in MM Docket No. 92-157 to allot Channel 266A to Durant, Mississippi. Although Vaughn is shown on a map of Mississippi in the *1993 Rand McNally Commercial Road Atlas*, it is not listed in the 1990 U.S. Census.

upgrade and deleting the vacant Ebenezer channel would be fully consistent with recent pronouncements by the Commission regarding the need to take into account the economic plight of smaller market radio stations such as WCLD-FM. Further, maintaining the vacant Ebenezer channel would simply weaken the financial viability of other stations in its area, as well as Station WCLD-FM. Radio Cleveland states that its proposal to upgrade Station WCLD-FM will strengthen an existing broadcast service that is currently serving its area well and at the same time eliminate a channel that probably will never be financially viable.

5. Radio Cleveland also argues that the expression of interest of Afro-American Broadcasters should not be credited as there is no indication as to whether this is an individual or a corporation and if it is qualified to file an application for the vacant Ebenezer channel. Radio Cleveland further argues that without identification or additional information, there is no way to determine if the expression of interest is sincere or simply intended to block improved service by Station WCLD-FM.

6. We find that Ebenezer no longer qualifies as a "community" for allotment purposes. Although an interest was expressed in retaining the channel, no contrary evidence was presented to establish that Ebenezer is a community for allotment purposes. Therefore, we will not retain the channel based on our determination that Ebenezer no longer qualifies as a community. Afro-American Broadcasters' response to the *Notice* consisted of a simple expression of interest in the channel which indicated that it would file an application for the channel.[4] Afro-American Broadcasters did not address the discussion in the *Notice* concerning JimBar's reasons for deletion of the channel at Ebenezer, although given an opportunity to do so in its comments, and therefore neglected to provide any showing that supports retention of the channel.[5] Therefore, we will delete Channel 280A at Ebenezer. *See Penacook, New Hampshire*, 2 FCC Rcd 459 (1987), *Flora and Kings, Mississippi and Newellton, Louisiana*, 7 FCC Rcd 5477 (1992), *Searles Valley, California*, 3 FCC Rcd 5221 (1988) and *Garden City, Indiana*, 6 FCC Rcd 3747 (1991). Pursuant to Section 307(b) of the Communications Act, FM channels are allocated to specific communities. In the Declaratory Ruling Concerning the Meaning and Effect of Section 73.642(a)(3), 55 FCC 2d 187, 189 (1975), the Commission held that: "Although broadly speaking, a community consists of an identifiable population grouping with common local interests, there is no hard and fast rule to apply in deciding whether a particular population grouping constitutes a community and all relevant facts in each case must be weighed. Incorporation is not a prerequisite, and while a community need not have a clearly delineated area and population, it is no doubt correct to state that in most cases a community is a city, town, village or other political subdivision," citing *Mercer Broadcasting Co.*, 22 FCC 1009 (1957); *Musical Heights, Inc.*, 37 FCC Rcd 82 (1964); *Holston Broadcasting Corp.*, 1 R.R. 2d 982 (1964); and *Hymen Lake*, 46 FCC 2d 560 (1974). Ebenezer is not incorporated or listed in the 1990 U.S. Census. The *1993 Rand McNally Commercial Atlas* estimates Ebenezer's population at 100. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983). We note that Ebenezer has a post office and a zip code. However, the presence of a post office and a zip code is not sufficient to establish community status. *See Coker, Alabama*, 43 RR 2d 190 (1978). In this case, Ebenezer has several of the attributes normally associated with a community and on that basis was allotted an FM channel. However, the only permittee for the channel has since requested dismissal of the construction permit and deletion of the channel after determining the community could not support an FM station in light of current economic conditions and Ebenezer's declining population.

7. In response to Radio Cleveland's concerns over economic plight of smaller market radio stations, we note that the Commission recognizes the increased competition and economic hardships among stations in radio markets. However, in light of the outcome herein, there is no need to address this issue. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), aff'd 4 fCC Rcd 2276 (1989). With respect to Radio Cleveland's allegation that the expression of interest filed by Afro-American Broadcasters could have been filed merely to block the requested upgrade by Station WCLD-FM, Radio Cleveland failed to provide proof of this allegation. Furthermore, Radio Cleveland also failed to show that the inability to identify Afro-American Broadcasters as an individual or corporation would establish a lack of good faith on the part of Afro-American Broadcasters. Accordingly, and in light of the outcome herein, we see no reason to address this issue further at this time.

8. After consideration of the information filed in this proceeding, we believe the public interest would be served by the substitution of Channel 280C3 for Channel 280A at Cleveland, Mississippi, and deletion of vacant Channel 280A at Ebenezer, Mississippi.[6] In accordance with Section 1.420(g) of the Commission's Rules, we will modify the license for Station WCLD-FM, Channel 280A, Cleveland, Mississippi, to specify operation on Channel 280C3.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

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[4] Afro-American Broadcasters indicates that the communities of Goodman, Durant and Vaughn, Mississippi, would also be served by an allotment at Ebenezer. We note, however, that a licensee's primary obligation is to serve the needs and interests of the community to which it is licensed. *See Ludlow, California*, 4 FCC Rcd 6883 (1988) and Section 73.1120 of the Commission's Rules.

[5] It is always in the commenters' best interest to present the Commission with supporting evidence during the rule making process, especially in cases where, as here, the area in question is neither incorporated nor recognized by the U.S. Census. Timely disclosure ensures that all information will be considered in the deliberations before an allotment is made or deleted.

[6] The coordinates for Channel 280C3 at Cleveland are 33-43-59 and 90-41-38.

Community	Channel No.
Cleveland, Mississippi	224A, 252C3, 280C3[7]
Ebenezer, Mississippi	----

10. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WCLD-FM, Cleveland, Mississippi, IS MODIFIED to specify operation on Channel 280C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Radio Cleveland, Inc., licensee of Station WCLD-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[7] Larry G. Fuss has proposed the substitution of Channel 225C2 for Channel 224A in MM Docket 92-157. *See* 7 FCC Rcd 4840 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-175

In the Matter of

Amendment of Section 73.202(b),	RM-8034
Table of Allotments,	
FM Broadcast Stations.	
(Pawley's Island and Atlantic	
Beach, South Carolina)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 10, 1993; Released: December 13, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Audrey R. Morris ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5231 (1992), proposing the reallotment of Channel 262A from Pawley's Island to Atlantic Beach, South Carolina, as the community's first local aural transmission service, and the modification of Station WPAW's construction permit to specify Atlantic Beach as its community of license. Comments in support were filed by the petitioner. No other comments were received.

2. We believe the public interest would be served by allotting Channel 262A to Atlantic Beach since it could provide the community with its first local aural transmission service without depriving Pawley's Island of its sole local transmission service. In addition to Channel 262A, Pawley's Island (population 176)[1] has allotted to it Channel 253A, and a construction permit has been issued to Station WDAI on that channel. We recognize that both Pawley's Island stations are off the air. While we consider important the potential service that unbuilt stations represent, we acknowledge that they are not a service on which the public has come to rely. Therefore, we do not consider their removal from a community to represent the same concerns with loss of service that removal of an operating station would represent. Atlantic Beach (population 446) is an incorporated community, with its own local government, police department, town hall, community center and church. In addition, the change in community will enable Station WPAW to increase the population which it serves from 53,309 persons to 82,287 persons. Finally, neither Pawley's Island nor Atlantic Beach is within an Urbanized Area.

TECHNICAL SUMMARY

3. Channel 262A can be allotted to Atlantic Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Atlantic Beach, South Carolina	262A
Pawley's Island, South Carolina	253A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Audrey R. Morris for Station WPAW, IS MODIFIED to specify Atlantic Beach, South Carolina, in lieu of Pawley's Island, South Carolina, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Audrey R. Morris, permittee of Station WPAW, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

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[1] Population figures are taken from the 1990 U.S. Census.

[2] The coordinates for Channel 262A at Atlantic Beach are North Latitude 33-48-09 and West Longitude 78-43-00.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-196

In the Matter of

Amendment of Section 73.202(b), RM-8275
Table of Allotments,
FM Broadcast Stations.
(Point Arena, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 17, 1993; Released: December 13, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 4853 (1993), issued in response to a petition filed on behalf of Del Mar Trust ("petitioner") proposing the allotment of Channel 272B1 to Point Arena, California, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal. No other comments were received.

2. We believe the public interest would be served by allotting Channel 272B1 to Point Arena since it could provide a first local aural transmission service to the community. Channel 272B1 can be allotted to Point Arena consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without a site restriction, at coordinates 38-54-42 and 123-41-24.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **Janurary 27, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Point Arena, California, as follows:

City	Channel No.
Point Arena, California	272B1

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications for Channel 272B1 at Point Arena, California, will open on **January 28, 1994,** and close on **February 28, 1994.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 272B1 at Point Arena, California, should be addressed to the FM Branch, Audio Services Division, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-220

In the Matter of

Amendment of Section 73.202(b), RM-8293
Table of Allotments,
FM Broadcast Stations.
(Houston, Alaska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 17, 1993; Released: December 13, 1993

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 5201 (1993), issued in response to a petition filed on behalf of Evangelistic Alaska Missionary Fellowship, Inc. ("petitioner") proposing the allotment of Channel 221A to Houston, Alaska, as that community's second local FM service. Petitioner filed comments reiterating its intention to apply for Channel 221A, if it is allotted to Houston, as requested. No other comments were received.

2. We believe the public interest would be served by allotting Channel 221A to Houston since it could provide a second local FM service to the community.

TECHNICAL STATEMENT

3. As stated in the *Notice*, Channel 221A can be allotted to Houston consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules without a site restriction at coordinates 61-38-01 and 149-50-28.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Houston, Alaska, as follows:

City	Channel No.
Houston, Alaska	221A, 232A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 221A at Houston, Alaska, will open on **January 28, 1994,** and close on **February 28, 1994.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 221A at Houston, Alaska, should be addressed to the FM Branch, Audio Services Division, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

MM Docket No. 90-566

In the Matter of

Amendment of Section 73.202(b),	RM-7421
Table of Allotments,	RM-7656
FM Broadcast Stations.	RM-7657
(Decatur, Petal, and Newton, Mississippi)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 18, 1993; Released: December 13, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before the Petition for Reconsideration filed by Vicki Y. Taylor ("Taylor") directed to the *Report and Order* in this proceeding, 7 FCC Rcd 4998 (1992). Thomas William Hickman, III, filed a Motion for Immediate Dismissal or, Alternatively, Denial of Petition for Reconsideration. Taylor filed a Request for Approval of Withdrawal of Petition for Reconsideration. For the reasons discussed below, we dismiss the Petition for Reconsideration.

2. The *Report and Order* in this proceeding upgraded Station WMFM, Channel 292A, Petal, Mississippi, to specify operation on Channel 292C3, and modified the license of Station WMYQ, Channel 292A, Newton, Mississippi, to specify operation on Channel 250A. In doing so, the *Report and Order* dismissed a counterproposal filed by Taylor proposing a Channel 250C3 allotment for Decatur, Mississippi. The Taylor Petition for Reconsideration is directed against that dismissal.

3. On September 1, 1993, Taylor filed the Request for Approval of Withdrawal of Petition for Reconsideration requesting dismissal of her Petition for Reconsideration.[1] As requested, we will dismiss the Petition for Reconsideration.

4. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Vicki Y. Taylor IS DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

[1] In accordance with Section 1.420(j) of the Rules, Taylor included an affidavit stating that the monies received for withdrawal of her Petition for Reconsideration do not exceed her reasonable and prudent expenses incurred in the preparation, filing, and advocacy of the proposed allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-339

In the Matter of

Amendment of Section 73.202(b),	RM-7857
Table of Allotments,	RM-7901
FM Broadcast Stations.	RM-7921
(Alfred, Campbell and Waverly, New York)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 1, 1993; Released: December 13, 1993

By the Acting Chief, Allocations Branch:

1. At the request of Markey Broadcasting Company ("Markey"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 6959 (1991), proposing the allotment of Channel 270A to Campbell, New York, as the community's first local FM service. Markey filed comments reiterating its intention to apply for the channel, if allotted. Counterproposals were filed by WATS Broadcasting, Incorporated ("WATS"), requesting the substitution of Channel 271A for Channel 272A at Waverly, New York, and the modification of Station WAVR's license to specify the alternate Class A channel, and by Pembrook Pines Elmira Ltd. ("Pembrook Pines"), requesting the allotment of Channel 270A to Alfred, New York, as the community's first local commercial FM service.[2] Reply comments were filed by Markey, Futuremark Communications, Inc. ("Futuremark"), Pembrook Pines, and PMJ Communications, Inc. ("PMJ").

2. Pembrook Pines asserts that Channel 270A should be allotted to Alfred rather than Campbell. In support, it states that Alfred is an incorporated municipality with a 1990 U.S. Census population of 4,559 persons, and its own economic, political and social environment. Alfred is also home to Alfred University and Alfred State College (State University of New York). Pembrook Pines notes that Alfred has two noncommercial educational FM stations, Station WALF, licensed to Alfred University and Station WETD, licensed to State University of New York. However, Pembrook Pines asserts that both stations operate with facilities well below that of commercial Class A licensees and have limited broadcast schedules.[3] Further, since both P stations are noncommercial, neither satisfies the needs of Alfred's business community for an advertising outlet. Therefore, it contends that Channel 270A should be considered as a first local aural transmission facility for Alfred. Pembrook Pines states that it will apply for Channel 270A, if allotted to Alfred.

3. Both WATS and Pembrook Pines argue that Channel 270A should not be allotted to Campbell. While the surrounding town of Campbell has a 1990 U.S. Census population of 3,658 persons, they state that the "hamlet" of Campbell has no corporate structure or distinct legal boundaries and no municipal governing system.[4] WATS also claims that Campbell receives service from three AM and four FM stations licensed to the nearby communities of Corning and Bath, New York. Finally, WATS questions whether Channel 270A could provide the entire town of Campbell with the required 70 dBu service, noting that Campbell covers approximately 109.4 square kilometers and much of the surrounding terrain is hilly.

4. WATS urges the substitution of Channel 271A for Channel 272A at Waverly to enable Station WAVR to improve its facilities to 6 kW. It states that Waverly has a 1990 U.S. Census population of 4,787 persons. Further, WATS states that Waverly is less well served than Campbell, claiming that "meaningful" radio service is presently received only from co-owned Station WATS(AM), Sayre, Pennsylvania. It notes that Waverly will receive FM service from unoccupied but applied-for Channel 241A at South Waverly, Pennsylvania.[5]

5. Futuremark, licensee of Station WTLQ, Pittston, Pennsylvania, supports the substitution of Channel 271A for Channel 272A at Waverly, stating that the modification of Station WAVR's license would allow Station WTLQ to improve its facilities to 6 kW. In addition, the substitution of channels at Waverly would permit Station WTLQ to relocate its transmitter from the valley in which it is presently located, thus removing severe multipath distortion currently experienced by the residents of Pittston. Further, these actions could enable Station WTLQ to serve an additional 100,000 persons. Futuremark also supports the allotment of Channel 270A to Alfred. Like Pembrook Pines and WATS, it questions Campbell's status as a community for allotment purposes. It states that the hamlet of Campbell consists only of a few blocks of houses, a gas station, a restaurant, two churches and a cheese processing plant but that it has none of the generally accepted indicia of a community, having no government, police department or garbage collection. Futuremark acknowledges that Camp-

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[1] The communities of Alfred and Waverly, New York, have been added to the caption.

[2] Public Notice of the filing of Pembrook Pines' counterproposal was given on February 4, 1991, Report No. 1874. Public Notice of WATS' counterproposal was given on March 5, 1992, Report No. 1880.

[3] Futuremark states that both Station WALF and Station WETD are on the air only during the fall and spring sessions of school. The Commission staff has confirmed that both stations operate with less than maximum Class A facilities, with Station WALF's 70 dBu signal extending 3.7 kilometers (2.3 and Station WETD's 70 dBu signal extending 7.4 kilometers (4.6 miles).

[4] There appears to be some confusion as to whether Campbell is a "town," "township" or "hamlet" and which of these appellations denotes the place for which the allotment is being sought. In the State of New York, there is no legal distinction between a town and township. Each community chooses the term by which it will be identified. According to the *1993 Rand McNally Commercial Atlas*, Campbell is a town. There is also listed an unclassified unit, with a population of 300 people, which is also identified as Campbell. The allotment under consideration herein is for the town of Campbell.

[5] A construction permit for Channel 241A at South Waverly has since been granted to William F. O Shaughnessey for Station WLGK.

bell does have its own post office and zip code. However, it argues that the existence of a post office and zip code is insufficient evidence to find that a place is a community for allotment purposes, citing *Lopez, Pennsylvania*, 5 FCC Rcd 2022 (1990).

6. Should the Commission believe that Campbell warrants an allotment, Futuremark suggests that Channel 270A be allotted to Campbell with alternate coordinates (North Latitude 42-14-04 and West Longitude 77-21-31) which would comply with the minimum distance separation requirements with respect to - Channel 271A at Waverly.[6] Futuremark states that the proposed site is located 17.2 kilometers (10.7 miles) from the town of Campbell. However, because of unique terrain factors, Futuremark states that the required 70 dBu signal will be provided to the entire town of Campbell. Futuremark alternatively suggests that Channel 270A be allotted to Campbell with a less restrictive site restriction by requiring Waverly's Station WAVR to relocate its transmitter.

7. Markey states that the mutual exclusivity between the Alfred and Campbell proposals can be resolved by allotting Channel 294A to Alfred with a site restriction southwest of the community. In addition, it agrees with Futuremark that the mutual exclusivity between the Waverly and Campbell proposals can be obviated by imposing a more restrictive site restriction on the Campbell allotment. However, Markey questions whether WATS really wants to improve Station WAVR's facilities, stating that the station's transmitter could have been relocated earlier to a site which would have provided better coverage as well as the ability to operate with 6 kW of power. Markey does not respond directly to the issue of whether the Campbell allotment will provide the entire community with the required 70 dBu signal. However, it states that terrain obstructions are prevalent in the area and believes that on-channel boosters or translators will be required no matter what transmitter site is proposed.

8. Pembrook Pines states that Channel 294A cannot be allotted to Alfred in compliance with the Commission's Rules. It states that Channel 294A, in order to avoid short-spacings to Stations WYRK, Channel 293B, Buffalo, New York, WOSB, Channel 294A, Irondequoit, New York, and WZKZ, Channel 291B, Corning, New York, requires a site restriction of approximately 12 kilometers (7.5 miles) southwest of Alfred. It describes the theoretical transmitter site area as being a "narrow sliver of land." Noting that the transmitter needs to be located on high ground to provide coverage to Alfred, it contends that the potential transmitter site area is, in actuality, even smaller since much of the area is comprised of the Duke Creek valley. Pembrook Pines further states that use of a directional antenna is not feasible because the directional null would point directly toward Alfred.

9. PMJ, licensee of Station WCKR, Channel 221A, Hornell, New York, supports the allotment of Channel 270A to the town of Campbell although it states that it will apply for the channel whether it is allotted to Campbell or Alfred. It disputes Futuremark's contention that "township type municipalities" are rarely allotted channels stating that the Commission routinely allots channels to "towns" such as Campbell. PMJ states that Campbell has a larger permanent population than Alfred, noting that the vast majority of Alfred's population consists of students and faculty associated with the two colleges. In addition, PMJ states that Alfred's population has declined more than ten percent between 1980 and 1990. Further, it argues that the allotment of Channel 270A to Alfred should be considered as the community's third local aural transmission service, not as the community's first such service. PMJ acknowledges that the noncommercial educational stations do not operate on a year-round basis. However, it argues that neither of the noncommercial educational stations is prohibited from expanding to year-round operation and, in fact, notes that Station WALF is considering an expansion of its operating schedule as well as improvement in the station's facilities.[7] PMJ notes that Pembrook Pines is not only the licensee of an AM and FM station combination in Elmira, New York, but also the owner of an AM and FM station combination in Bath, New York, which is adjacent to Campbell. Therefore, it questions whether Pembrook Pines's counterproposal was filed for the purpose of preventing additional competition.[8]

10. *Discussion.* As an initial matter, we find that Campbell is a community for allotment purposes. The town of Campbell is listed in the 1990 U.S. Census with a population of 3,658 persons. No evidence has been submitted to rebut the presumption of community status which arises from being listed in the U.S. Census. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982) (community status presumed if community is incorporated or is listed in the census). Further, although there appears to be a substantially smaller population grouping also known as Campbell, the opponents provide no substantiation for their arguments that it is this smaller population which Markey seeks to serve.

11. A staff engineering analysis shows that Channel 271A can be substituted for Channel 272A at Waverly regardless of whether Channel 270A is allotted to Alfred or Campbell. Therefore, we will substitute Channel 271A for Channel 272A at Waverly since it could allow Station WAVR to improve its facilities to 6 kW of power and expand the station's coverage area. As requested, we will modify Station WAVR's license to specify the alternate Class A channel.

12. We turn next to the mutually exclusive proposals for Alfred and Campbell. While it has been suggested that Channel 294A be allotted to Alfred, our engineering analysis shows that there is a severe terrain obstruction between the transmitter site proposed by Markey and the community which would prevent the provision of 70 dBu service to Alfred.

13. After careful consideration of the comments filed, we conclude that the allotment of Channel 270A to Campbell

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[6] *See* Counterproposal Comments, February 19, 1992.

[7] According to the Declaration of Robert Allgrim, Faculty Advisor for Station WALF, "[w]e have plans for moving our studios soon to the new campus center and then changing our transmitter location so that we can increase the coverage area of WALF. . . Also under consideration are plans for more information programs such as local news and comment. Then, in response to increasing demand from our listeners, WALF may very well begin broadcasting twelve months a year so that we can serve those people in the Alfred area who are not students."

[8] Since PMJ has stated an intention to apply for Channel 270A whether allotted to Campbell or Alfred, we need not consider this issue.

is not technically feasible.[9] In responding to the opposing comments filed by WATS, Markey did not provide a technical study demonstrating that a Channel 270A Campbell station could provide the entire community with the required 70 dBu signal. Instead, Markey states that an on-channel booster or translator would be required, regardless of the transmitter site chosen, because of the prevalence of terrain obstructions in the area. However, the Commission will not grant an allotment proposal which does not meet the city-grade coverage requirements set forth in Section 73.315. As stated in *Greenwood, South Carolina, et al.*, 3 FCC Rcd 4108 (1988), "[i]t would be counterproductive to allot a channel whose utilization could not result in a signal of adequate quality. Resources would generally be wasted in rule making proceedings to allot channels which from the outset could not conform to Commission rules, such as that set forth in Section 73.315(a)." Futuremark contends that the site it has proposed, 17.2 kilometers (10.7 miles) from Campbell, would permit 70 dBu coverage of the entire town. However, Class A channels are assumed to be able to provide such service only if located no further than 16.2 kilometers (10.1 miles) from the center of the community. The Commission does permit an exception to this policy in the case of existing stations which seek a change in channel and the proposed transmitter site is outside the theoretical area. However, the licensee must provide the Commission with the same type of information which is required at the application stage, i.e., certification of site availability and FAA concurrence in use of the site. *See Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398 (1988), *Nyssa, Oregon*, 6 FCC Rcd 167 (1991). This exception does not extend to allotments available for general application. *See Stuart and Boone, Iowa*, 6 FCC Rcd 6036 (1991). Therefore, we are unable to conclude that a Campbell allotment could comply with the requirements set forth in Section 73.315 of the Commission's Rules.

TECHNICAL SUMMARY

14. Channel 270A can be allotted to Alfred in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 271A can be allotted to Waverly at the transmitter site specified in Station WAVR's license.[10] Canadian concurrence in both of the allotments have been received since Alfred and Waverly are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Alfred, New York	270A
Waverly, New York	271A

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WATS Broadcasting, Incorporated, for Station WAVR, Waverly, New York, IS MODIFIED to specify operation on Channel 271A in lieu of Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WAVR's license, File No. BLH-6421, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-6421, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

17. The window period for filing applications for Channel 270A at Alfred, New York, will open on **January 28, 1994,** and close on **February 28, 1994.**

18. IT IS FURTHER ORDERED, That the proposal of Markey Broadcasting Company (RM-7857) to allot Channel 270A to Campbell, New York, IS DENIED.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[9] Because the allotment of Channel 270A to Campbell is not technically feasible, we need not reach the merits of Pembrook Pines argument that the noncommercial educational stations licensed to Alfred should not impede the allotment of Channel 270A to Alfred because neither educational station operates on a year-round basis or with full Class A facilities.

[10] The coordinates for Channel 270A at Alfred are North Latitude 42-15-30 and West Longitude 77-47-30. The coordinates for Channel 271A at Waverly are 42-03-48; 76-31-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-538

In re Applications of

SARASOTA-CHARLOTTE BROADCASTING CORPORATION — File No. BPH-870908MX

SANDPIPER BROADCASTING, INC. — File No. BPH-870910OG

For Construction Permit for a New FM STation on Channel 290A in Englewood, Florida

APPEARANCES

John F. Garziglia and *Louise Cybulski*, on behalf of Sarasota-Charlotte Broadcasting Corporation; and *Peter Doyle* on behalf of Sandpiper Broadcasting, Inc.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: December 2, 1993; Released: December 13, 1993

1. The United States Court of appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings. *Sarasota-Charlotte Broadcasting Corporation* v. *FCC*, No. 91-1186 (D.C. Cir. October 27, 1992).

2. The Commission, in turn, remanded this proceeding for further hearing and the preparation of a Supplemental Initial Decision on an expedited basis. FCC 93-408, released August 30, 1993. In so doing the Commission said:

> "No further hearing is required. The standard comparative issue considered by the ALJ is broad enough to permit full consideration of SCBC's proposal and the ultimate resolution of this proceeding. See *Sarasota-Charlotte Broadcasting Corporation*, 4 FCC Rcd 8106, 8106 ¶ 2 (1989)."

3. We are left then with two mutually-exclusive applicants, Sarasota-Charlotte Broadcasting Corporation (SCBC) and Sandpiper Broadcasting Inc. (Sandpiper). They seek FM Channel 290A in Englewood, Florida. And these two applicants face one factual issue, along with the ultimate conclusionary issue:

> (1) To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> (2) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applicants should be granted, if any.

4. An additional matter must be considered. The Chief, Audio Services Division has called for comparative coverage. See 53 F.R. 51585 published December 22, 1988, at para.11.

5. The further Prehearing Order was released on September 3, 1993 (FCC 93M-570), an evidentiary admissions session was held on September 24, 1993, and a further hearing was convened on October 13, 1993. See FCC 93M-654 released October 15, 1993.

6. SCBC and Sandpiper filed their Proposed Findings of Fact and Conclusions of Law on November 19, 1993, and their Reply Findings on November 29, 1993.

Issue 1: The Standard Comparative Issue
Description of the Applicants

7. *SCBC*, a Florida Corporation, has the following stockholders:

Name	% of Stock Owned
E.J. "Ted" Ewing	90.2%
Leah B. Lasbury, Trustee for Clyde and Leah B. Lasbury	0.72%
Ruth B. Kuykendall	2.16%
Leah B. Lasbury	1.73%
Louis Tracy	1.73%
James Bartlett, Jr.	1.73%
Allen E. Bartlett	1.73%

8. *Sandpiper*, a two tier Florida Corporation, has issued both voting and non-voting stock. The following chart shows the status of its four stockholders:

Name	Equity Percentage	Stock Interest:	Officer/ Director
John E. Piper	16.67%	50% voting stock	President, Treasurer and Director
Patricia A. Piper	16.67	50% voting stock	Vice-President, Secretary and Director
William F. Piper	33.33%	50% non-voting stock	———
William F. Piper II	33.33	50% non-voting stock	———

Diversification of Mass Media

9. Since November 1964, when the station went on the air *SCBC* was the licensee of WENG(AM) in Englewood, Florida. WENG was a 1Kw, daytime only station operating on 1530 KhZ. Initially, SCBC pledged to divest itself of WENG(AM) within three years after program test authority on its proposed FM operation commenced. On August

27, 1993, SCBC fulfilled its pledge They sold WENG(AM). Neither SCBC nor its principals have any other interests in any medium of mass communications.

10. *Sandpiper* was formed in 1986. Its original goal was to obtain a new FM station in Holmes Beach, Florida. The *Holmes Beach* case settled out and Sandpiper received a one-seventh interest in the merged entity. However, Sandpiper will divest their interest in the Holmes Beach operation if their Englewood application is granted.

11. *Intermediate Diversification Findings.* Both SCBC and Sandpiper are entitled to maximum diversification credit. Neither applicant holds any cognizable mass media interests. So they are equal under the diversification criterion.

Best Practicable Service
Comparative Coverage

12. The following table depicts the total areas and populations within each applicant's predicted 1mV/m service contour. The table is based on the lower coverage of each applicant as of the "B" cutoff date or its most recent engineering amendment.

Applicant	Area (Sq. Km.)	1980 Census Population
SCBC	711.6	65,451
Sandpiper	711.6	68,823

13. Both proposed service areas presently receive 5 or more primary FM services both day and night. So no underserved areas are involved.

14. The coverage attributes of SCBC and Sandpiper are virtually indistinguishable. Sandpiper's slight population advantage over SCBC is *de minimus*. So comparative coverage plays no part in determining the comparative winner.

Integration of Ownership With Management

15. *SCBC* claims 90.2% quantitative integration. They will integrate E.J. "Ted" Ewing, SCBC's President and 90.2% owner into the everyday operation and management of the proposed station. Ewing will serve full-time as General Manager, managing and supervising the overall station operation. Ewing will hire and fire the station's employees; he will establish and implement the station's public service programming; and he will generally administer and take responsibility for all the business and financial affairs of the station.

16. Ted Ewing was born on June 3, 1932 in Detroit, Michigan. He holds a Bachelor of Science degree from Notre Dame University. And in 1960, he earned a Master's degree in General Business from Wayne State University.

17. Ewing *lived* in Englewood, the proposed community of license, from 1964 to 1974. From 1974 to 1984 he lived in Venice, Florida, and from 1984 to 1992 in Nokomis, Florida. Both Venice and Nokomis are within SCBC's proposed FM service area. In 1992 he moved to Osprey, Florida, outside of SCBC's proposed service area.[1]

18. Ted Ewing claims and is entitled to substantial comparative credit for *participating in civic activities* within SCBC's proposed service area. In 1976 he founded the Life, Drug Rehabilitation Program. He is currently a Director of that Program. He was in 1982-1983 the past President and Director of Senior Friendship Centers.

19. He has been a member of Goodwill Industries since 1980; he was Chairman in 1987. He has been its past President and is currently a Director.

20. Ewing has been a member of the Englewood Chamber of Commerce from 1964-1993, and was President of the Chamber in 1966. He is a 25 year member and former director of the Englewood Rotary Club. He is a past member of Veterans of Foreign Wars and the Knights of Columbus, and a past charter member of the Englewood Elks.

21. From 1968-1980 he served as a member of the Board of Directors of the Venice Hospital. In 1988 he was elected a member to the Sarasota County Public Hospital Board, and served until 1922 including one year as Chairman.

22. Ted Ewing has received the following awards recognizing his civic activities: (1) the Sarasota Bicentennial Patriot Award-1976; (2) the State Fireman's Legislative Award-1982; (3) the John Cummins Legislative Award-1982; (4) the Jaycees good Government Award-1982; and (5) the Florida Conservative Union Award-1978, 1980 and 1982.

23. SCBC claims and is entitled to substantial comparative credit for Ted Ewing's *past broadcast experience*. Ewing was an Account Executive at WJR(AM), Detroit, Michigan from 1959 to 1964. Then, from 1964 to 1993 he was President of SCBC, the licensee of AM Station WENG, Englewood, Florida. From 1969 to 1974 he also owned and operated a cable television system in Englewood. From 1980-1981, Ewing was President of the Florida Association of Broadcasters. He also served two two-year terms as a member of the NAB's AM Daytime Broadcasters Committee and the NAB Legislative Committee.

24. Being a White, non-Hispanic, non-Asian, Ted H. Ewing lays no claim to *minority enhancement*. Ewing has no intention of installing *auxiliary power* equipment at SCBC's proposed facilities.

25. SCBC also seeks and will be credited with a daytimer preference for owning WENG(AM), Englewood, Florida. WENG was a 1 Kw, *daytime only* station operating on 1530 KHz. SCBC timely pledged to divest itself of WENG(AM) within three years after program test authority on its proposed FM operation commenced. They did, in fact, divest of WENG(AM) on August 27, 1993. SCBC has also established that Ted Ewing managed WENG(AM) for the three year period before they filed their FM application; i.e., the three year period before September 8, 1987.

26. Sandpiper has attacked SCBC's integration proposal on essentially two grounds. First they argue that SCBC has failed to set forth and maintain a definite, certain, or credible integration proposal. Secondly, Sandpiper argues that Ewing's work commitment is incredible and unconvincing.

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[1] Ewing argues that he "believes" Osprey ".. . to be on the border of the 60 dBu contour of the proposed station." That argument is rejected. It is up to an applicant to establish his claim to local residence. Ewing has failed to do so. Obviously we don't know on which side of the 60 dBu border he lives. Moreover, we are concerned with the proposed 1 mV/m contour, not the 60 dBu.

27. Those two arguments are rejected. Admittedly the evidentiary record on SCBC's integration intentions, and on Ted Ewing's role as an owner-manager is hardly a model of clarity. Nor was the development of a coherent record aided by the Court of Appeals' observations and reasoning in its remend order.[2] See para.1 *supra*.

28. But, the record as a whole supports the finding that Ted Ewing has always retained ultimate managerial responsibility for the operation of Station WENG(AM). There were times between 1964 and 1993 when he gave the title "General Manager" to other employees in lieu of raises because he believes ". . . titles were important in a small station in a small community. . ." However, ultimate managerial responsibility remained his.

29. So there is no reason to believe that Ted Ewing will not live up to his integration pledge. See Finding 15 *supra*. He can be counted upon to assume ultimate managerial responsibility for SCBC's proposed FM operation.

30. *Sandpiper* claims 100% quantitative integration. They will integrate both of their voting stockholders into the proposed station's day-to-day operations.

31. First, Sandpiper intends to integrate their President, Treasurer, Director, and 50% voting stockholder, John E. Piper, into the station's day-to-day operations. John E. Piper will serve full-time (40 hours or more per week) as station manager. In that capacity he will supervise and direct the station's affairs. This will include the station's construction, its operations, and its news and programming.

32. John E. Piper was born on May 26, 1961 in Michigan. He holds a Bachelor's degree (with distinction) from the University of Michigan. In 1985 he and his wife Patricia (*infra.*) moved to and established *residence* in Sarasota, Florida. There he worked as a mortgage banker at First Florida Bank. Since July 1987 he has been a stockbroker with Dean Witter Reynolds.

33. Sarasota is outside the 1mV/m contour of their proposed station. So neither John E. Piper nor his wife Patricia can claim *local residence*. However, they have both pledged to terminate any employment they may have and move to Englewood, Florida, if Sandpiper's application is granted.

34. Because John Piper has never lived inside the contour of the proposed station, he cannot lay claim to *civic participation*. He has no *past broadcast experience*, and since he is White, non-Hispanic, and non-Asian he cannot qualify for *minority* enhancement.

35. Second, Sandpiper intends to integrate their Vice-President, Secretary, Director and 50% voting stockholder, Patricia A. Piper into the station's day-to-day operations. She will serve full-time (40 hours or more per week) as Sales Manager. In that capacity she will supervise the sales staff. She will also serve as the station's personnel manager and will hire, promote, and fire its employees. She will also serve as the station's EEO officer, and its Community Relations Director.

36. Patricia Piper was born in Michigan on June 16, 1959. She was raised in Michigan and studied advertising and psychology at Aplena Community College. As noted (Findings 32-33 *supra.*) she moved to Sarasota, Florida with her husband in 1985. But, as also noted (Finding 33 *supra.*), she will terminate any employment she may have and move to Englewood and establish residence there if Sandpiper's application is granted.

37. Sarasota is outside the 1mV/m contour of Sandpiper's proposed station. Since she has never lived inside the proposed 1mV/m contour she can claim neither *local residence* nor *civic participation*.

38. However, she does have some *past broadcast experience*. In 1982-1983 she was an advertising consultant at WHSR(FM), Alpena, Michigan. There she sold advertising time and wrote copy. From 1983-1984, she did the same thing at WLAV(FM) Grand Rapids. And from 1984-1985, she did the same thing for WLHT(FM), Grand Rapids.

39. After she moved to Florida, Mrs. Piper worked as an Account Executive for WDUV-FM, Bradenton, Florida. Two years later she moved to Stover Cable Television in Sarasota as an Account Executive. She sold time, developed advertising proposals, and serviced accounts. From January to March 1989, she sold advertising for *West Coast Woman*, a biweekly South Florida publication.

40. Since Patricia Piper is White, non-Hispanic, and non-Asian, she cannot qualify for *minority enhancement*. Sandpiper proposes to install *auxiliary power* facilities.

Conclusions of Law

1. Two mutually-exclusive applicants, Sarasota-Charlotte Broadcasting Corp. (SCBC) and Sandpiper Broadcasting Inc. (Sandpiper) are vying for FM Channel 290A in Englewood, Florida. We have held the remanded hearing. Now we must reach a decision under the standard comparative issue.

2. We will examine both applicants under the criteria set out in the *Commission's 1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, as modified by subsequent Review Board and Commission decisions.

3. We will address the Commission's two *primary* allocation objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

4. *Diversification of Mass Media*. Neither applicant prevails under this criterion. Neither holds any cognizable interests. So the Commission's first *primary* objective is a wash. See Findings 9-11 *supra*.

5. *The Best Practicable Service*. We turn then to the Commission's second primary objectives. In deciding which applicant will offer the best practicable service we will: (1) decide whether any applicant should be preferred because of the superior areas and populations their proposal will serve (Comparative Coverage); (2) look at the extent each will integrate their ownership into the day-to-day management of the station (Quantitative Integration); (3) evaluate the attributes that each integrated owner will bring to that day-to-day management (Qualitative Integration); and (4) consider the extent to which the quantitative and qualitative integration is enhanced by minority status.

6. In evaluating Qualitative Integration (Para.5(3) *supra.*), we will analyze such factors as local residence, participation in civic affairs, past education and business experience,

[2] Footnote 6 of the Court's remand not only sanctioned evidentiary confusion, it encouraged it.

past broadcast experience, and auxiliary power. And in this instance we must examine SCBC's claim to a daytimer preference.

7. *Criterion 1: Comparative Coverage.* The coverage attributes of SCBC and Sandpiper are virtually indistinguishable. Sandpiper's slight population advantage over SCBC is *de minimis*. So comparative coverage plays no part in determining the comparative winner. See Findings 12-14 *supra*.

8. *Criterion 2: Quantitative Integration.* Sandpiper claims will be credited with 100% quantitative integration. See Finding 30 *supra*. SCBC claims and will be credited with 90.2% quantitative integration. See Findings 15, and 26-29 *supra*. So Sandpiper is entitled to a distinct preference under this criterion. However, this preference is not decisive, and SCBC is still entitled to have their qualitative attributes compared.

9. *Criterion 3: Qualitative Integration:* SCBC is entitled to a substantial preference under the *past local residence* factor. SCBC's integrated shareholder, Ted Ewing, resided in the proposed community of license from 1964 to 1974. And he lived within SCBC's proposed service area from 1975-1992. See finding 17 *supra*. On the other hand, John E. and Patricia Piper have *never* resided within the proposed service area of their station. They were both born and raised in Michigan, and didn't even come to the State of Florida until 1985.

10. However, Ted Ewing's local residence advantage is diminished somewhat. Since 1975 he has moved farther and farther away from the community of license, and in 1992, he moved out of the proposed service area entirely. The Pipers, on the other hand, have pledged to move to Englewood if Sandpiper's application is granted.

11. SCBC is also entitled to a substantial comparative preference under the *civic participation* factor. Compare Findings 18-22 with Findings 34 and 37. Over the years Ted Ewing has devoted a considerable amount of time and energy to civic and charitable institutions and programs in the Englewood area. He has earned SCBC a substantial preference.

12. SCBC is also entitled to a substantial preference for *post broadcast experience*. Compare Finding 23 with Findings 38-39. Susan Piper's (50%) 8 years of broadcast sales experience cannot begin to measure up to Ted Ewing's (90.2%) 5 years of broadcast sales experience, his 29 years in broadcast management and his 5 years of cable television ownership and operation.

13. In addition, SCBC seeks and will be credited with a *daytimers preference* for owning and operating WENG(AM), Englewood, Florida. WENG was a 1 Kw, daytime only station operating on 1530 KHz. The record establishes that SCBC timely pledged to divest itself of WENG(AM); ie.e., within three years after program test authority on its proposed FM operation commenced. They have fulfilled that pledge. The record further establishes that SCBC's Ted Ewing managed WENG(AM) for the three year period before they filed their FM application; i.e., the three year period before September 8, 1987.

14. Turning to the minor factor of *auxiliary power*, Sandpiper is entitled to a comparative advantage. They propose to install auxiliary power facilities. SCBC does not. See Findings 24 and 40 *supra*.

15. *Criterion 4: Minority Enhancement:* Finally, neither SCBC's nor Sandpiper's quantitative and qualitative integration are *enhanced by minority status*.

Issue 2: The Ultimate Issue

16. SCBC is our comparative winner. Sandpiper holds almost a 10% quantitative integration advantage (100% to 90.2%), a *de minimis* comparative coverage preference, and a clear preference under the minor qualitative factor of auxiliary power.

17. SCBC, on the other hand, has garnered a substantial qualitative preference under past local residence, a substantial qualitative preference for past broadcast experience, and an overwhelming qualitative preference for civic participation. Those qualitative attributes far outweigh Sandpipers comparative advantages. And when SCBC's daytimer preference is placed on the comparative scales, SCBC becomes the lop-sided comparative winner. Undoubtedly, SCBC will offer the best practicable service to the public.

SO, unless an appeal is taken from this Supplemental Initial Decision[3] or the Commission reviews it on his own motion, Sarasota Charlotte Broadcasting Corporation's application (BPH-870908MX) IS GRANTED; and

Sandpiper Broadcasting Inc's application (BPH-870910OG) IS DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

[3] Any exceptions to this Supplemental Initial Decision must be filed directly with the Commission. See FCC 93-408 *supra*, at para.5.

[4] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Macon County Broadcasting, Inc.
For a Construction Permit
for a New FM Station
Lafayette, Tennessee

File No. BPH-910821MG

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1993; Released: December 13, 1993

By the Commission:

1. The Commission has before it an Application for Review, filed on behalf of Macon County Broadcasting, Inc. ("MCBI"),[1] former applicant for a new FM station at Lafayette, Tennessee, seeking acceptance *nunc pro tunc* of its late hearing fee, and an Opposition filed on behalf of Ivon O. Davis ("Davis").

2. MCBI failed to remit its hearing fee in accordance with the deadline established by the November 4, 1991, public notice. That public notice announced that MCBI's application was mutually exclusive with that of Davis, and established December 6, 1991, as the petition to deny deadline and January 7, 1992, as the hearing fee payment deadline. MCBI, which was engaged in settlement negotiations, missed the deadline and did not file its hearing fee until February 7, 1992.[2] Given the untimely filing, the Managing Director dismissed MCBI's application, returned its fee, and subsequently denied its petition for reconsideration.

3. MCBI alleges that its counsel "for whatever reason" missed the November 4, 1991, public notice. MCBI challenges the Commission's procedure for establishing hearing fee deadlines. Specifically, MCBI argues that notice of hearing fee deadlines should be personally served on applicants rather than issued through public notices. According to MCBI, public notices fail to afford applicants adequate notice of applicable deadlines, deprive them of the right to a hearing under *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), and violate their constitutional due process rights, citing *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). Given the alleged inadequate notice, MCBI contends that the Commission should accept its hearing fee and reinstate its application *nunc pro tunc*, citing *Darrell Spann*, 6 FCC Rcd 5944 (Rev. Bd. 1991), in support of its position.

4. Davis opposes MCBI's application. Davis states that MCBI was aware of the Commission's revised procedures for filing hearing fees, as well as the consequences of untimely filings. Davis attributes MCBI's untimely filing to inadvertence and lack of diligence in prosecuting its application. Davis states that the hearing fee deadline is fundamentally no different from application deadlines for which the same notice is provided, and that failure to comply with such deadlines bars a prospective applicant from the comparative hearing process. Davis concludes that he timely complied with, and should be able to rely upon the strict enforcement of, all the Commission's procedural deadlines.

5. We affirm the decision of the Managing Director. Hearing fees and other fee payments must be timely filed. Absent timely tendered fee payments, applications are subject to immediate dismissal. *See* 47 U.S.C. § 158 (c)(2); 47 C.F.R. §§ 1.1107, 1.1110; *see also Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 956-57 (1987). The Commission's rules specifically require applicants to file their hearing fees by a date certain as set forth in public notices issued shortly after they file their applications. *See* 47 C.F.R. § 73.3573(g). In establishing this filing deadline, the Commission afforded all prospective applicants notice of the procedural requirements. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 158 (1990). Where, as here, the Commission's procedural deadline was clear and properly promulgated, the procedure will be strictly adhered to in the interest of orderly, efficient and predictable administration of the Commission's processes.[3]

6. MCBI's argument that personal, not public, notice of the hearing fee deadline is required is unavailing. The Communications Act does require that the Commission provide applicants and licensees personal notice of agency action in certain circumstances. *See* 47 U.S.C. § 309(e) (hearings on new, renewed, modified applications); 47 U.S.C. § 312(c) (revocations of licenses); 47 U.S.C. § 303(m) (suspension of operators' licenses). However, there is nothing in the Act that requires the Commission to afford applicants personal notice of procedural cut-off deadlines. It is incumbent upon applicants to diligently prosecute their applications by ascertaining and complying with the applicable filing deadlines established by public notices. *See, e.g., Florida Institute of Technology*, 952 F.2d at 553-54; *Hispanic Information*, 865 F.2d at 1295-96.

7. MCBI cited *Darrell Spann, supra*, as support for its argument that it should have received personal notice of the hearing deadline. However, *Darrell Spann* is distin-

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[1] Lafayette Broadcasting previously amended its application to substitute MCBI as the applicant.

[2] On March 20, 1992, MCBI and Davis filed a request for approval of settlement agreement. That agreement provided that MCBI would dismiss its application in exchange for an exclusive option to acquire Davis' construction permit. Subsequently, MCBI's request for acceptance of its late hearing fee was denied and its application was dismissed. The request for approval of the settlement agreement is still pending. MCBI seeks acceptance of its hearing fee and reinstatement of its application *nunc pro tunc* to preserve its status as a party to the comparative proceeding and its interest in the settlement arrangement.

[3] *See Florida Institute of Technology v. FCC*, 952 F.2d 549, 553-54 (D.C. Cir. 1992); *Hispanic Information and Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1295-96 (D.C. Cir. 1989); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986); *Way of Life Television Network, Inc.*, 67 FCC 2d 90, 91-93 (1978); *cf. Salzer v. FCC*, 778 F.2d 869, 874 (D.C. Cir. 1985). These cases recognize the validity of establishing and strictly enforcing filing deadlines by public notice. Although these cases concern cut-off deadlines for application filings, we agree with Davis that the decisions are equally applicable to hearing fee deadlines.

guishable from the instant case. *Darrell Spann* involved the Commission's inadvertent failure to serve a hearing designation order providing notice of a comparative renewal hearing upon a licensee, and thus was governed by 47 U.S.C. § 309(e) and 47 C.F.R. § 73.3593, not 47 C.F.R. § 73.3573. That is, the application was reinstated not because public notice of a fee deadline was deemed to be inadequate, as alleged here, but rather because the required service of a hearing designation order was not properly administered.

8. Moreover, contrary to MCBI's assertions, *Ashbacker* does not require that applicants receive personal notice of procedural deadlines or that applications that missed such deadlines be reinstated. *Ashbacker* requires only that, under the Communications Act, *bona fide* mutually exclusive applicants be granted a hearing. Here, MCBI was not a *bona fide* applicant because it failed to meet its hearing fee obligation, a prerequisite to participation in the hearing. *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192,202, 205 (1956); *Hispanic Information*, 865 F.2d at 1294.

9. With respect to MCBI's constitutional due process argument, as *Mullane* indicates, notice must be "appropriate to the nature of the case," and the Supreme Court recognized that "personal service has not in all circumstances been regarded as indispensable ...." 339 U.S. at 313-14. The fact that the Supreme Court found newspaper notice insufficient to notify beneficiaries of a trust of the disposition of the trust assets does not affect whether public notice in the FCC releases, pursuant to rule, is adequate notice of a hearing fee cut-off date. Indeed, the D.C. Circuit has found that such public notice *is* adequate. *See Hispanic Information*, 865 F.2d at 1295 (FCC cut-off public notices are "fully sufficient to satisfy statutory and constitutional standards").

11. Accordingly, IT IS ORDERED, That the Application for Review, filed by MCBI, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Stephen R. Weber KNAL/Acct. No: 215FE0138
North Bend, Washington

ORDER

Adopted: December 3, 1993; Released: December 13, 1993

1. Mr. Stephen R. Weber has requested review of a Forfeiture Order dated August 25, 1992. The forfeiture is mitigated to $100.

2. Mr. Weber was charged with operation of an unlicensed maritime mobile radio station. See 47 U.S.C. §301.

3. Mr. Weber makes no arguments. He simply pleads for cancellation of the forfeiture. The Commission has reconsidered the usual forfeiture for the violation. Consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures*, 8 FCC Rcd 6215 (1993) the forfeiture amount is reduced to $100.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Stephen R. Weber pay a forfeiture of $100 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215FE0138, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago,IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ray W. Larsen NAL/Acct. No: 215FE0068
Renton, Washington

ORDER

Adopted: December 3, 1993; Released: December 13, 1993

1. Mr. Ray W. Larsen has requested review of a Forfeiture Order dated August 24, 1992. The forfeiture is mitigated to $100.

2. Mr. Larsen was charged with operation of an unlicensed maritime mobile radio station. See 47 U.S.C. §301.

3. Mr. Larsen makes no new arguments. We accept that he did not intentionally violate the licensing requirement. The operation of the station is the willful act which makes the violation willful, as explained in the forfeiture order. Though Mr. Larsen dutifully acquired a license after being contacted by the Commission about the violation, this does not excuse the violation. The Commission has reconsidered the usual forfeiture for these circumstances. Consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures*, 8 FCC Rcd 6215 (1993) the forfeiture amount is reduced to $100.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Ray W. Larsen pay a forfeiture of $100 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215FE0068, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bruce J. Holmes NAL/Acct. No: 215FE0177
Seattle, Washington

ORDER

Adopted: December 3, 1993; Released: December 13, 1993

1. Mr. Bruce J. Holmes has requested reconsideration of a Forfeiture Order dated October 7, 1992. The forfeiture is cancelled.

2. Mr. Holmes was charged with operation of an unlicensed maritime mobile station. See 47 U.S.C. §301.

3. Mr. Holmes alleges, and other sources corroborate, that he was operating the vessel as an employee of one V. Krawczck. Mr. Holmes asserts that that gentleman informed him, correctly, that he, the owner, was responsible for licensing the radio. Mr. Holmes, however, admits his own responsibility.

4. Though Mr. Holmes should have made sure that the station was licensed before he operated it, we do not require that he obtain a personal license for the radio. This forfeiture should have been assessed to his employer; we note that a year has elapsed since the violation and, therefore, no forfeiture may be imposed on the owner. See 47 C.F.R. §1.80(c)(3).

5. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that the forfeiture assessed to Bruce J. Holmes is CANCELLED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lori Kuljis NAL/Acct. No: 215FE0071
Bellingham, Washington

ORDER

Adopted: December 3, 1993; Released: December 13, 1993

1. On June 8, 1992, a Notice of Apparent Liability for Monetary Forfeiture for $2,000 was issued to Lori Kuljis for willful violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. §301, as a result of operation of an unlicensed radio station on Marine Channel 69.

2. Through counsel, Ms. Kuljis requested further review of the case. Upon further review no evidence was discovered which would warrant further mitigation and a Notice of Forfeiture in the amount of $2,000 was issued on August 19, 1992. Again, through counsel, a further review was requested by Ms. Kuljis.

3. We are not persuaded by the arguments presented by Ms. Kuljis. The Commission has, however, reconsidered the appropriate amount of forfeiture for cases of this type. We are, therefore, reducing the forfeiture to $100. This is consistent with the *1993 Policy Statement, Standards for Assessing Forfeitures, 8 FCC Rcd 6215 (1993).*

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Lori Kuljis pay a forfeiture of $100 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215FE0071, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago,IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METRO MOBILE CTS, INC. — File Nos. 02886-CL-TC-1-92, 02888-CL-TC-1-92, 02893-CL-TC-1-92, 02521-CL-MP-89, 04376-CL-MP-92

For Consent To Transfer Control of Authorizations in the Domestic Public Cellular Radio Telecommunications Service to Bell Atlantic Enterprises International, Inc.

McELROY ELECTRONICS, INC. — File No. 02639-CL-MP-89

For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 26A Phoenix, Arizona

JAJ CELLULAR — File No.5 802905-CL-MP-89

For Authorization to Serve Unserved areas in Metropolitan Statistical Area Market No. 26A Phoenix, Arizona

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 2, 1993; Released: December 13, 1993

By the Commission: Chairman Hundt not participating.

I. INTRODUCTION

1. In this Order, we address petitions for reconsideration of the decision granting a transfer of control of various facilities from Metro Mobile CTS, Inc. (Metro Mobile) to Bell Atlantic Enterprises, Inc. (Bell Atlantic), a subsidiary of Bell Atlantic Corporation (BAC). *Metro Mobile CTS, Inc.*, 7 FCC Rcd 1822 (Mobile Serv. Div. 1992).[1] The petitions were filed by Radio Enterprises of Ohio (REO) and McElroy Electronics Corporation (McElroy). Metro Mobile and Bell Atlantic filed oppositions to each of the petitions, and McElroy and REO filed their respective replies. The facilities in dispute on reconsideration include those in the Phoenix, Arizona Metropolitan Statistical Area (MSA); the Windham, Connecticut Rural Service Area (RSA); and the Tucson, Arizona MSA.[2] We also address the reinstatement of applications by JAJ Cellular and McElroy for unserved areas in the Phoenix MSA. We discuss each of these markets separately. For the reasons set forth below, we grant relief in part and deny relief in part.

II. PHOENIX MSA ISSUES

A. Background

2. The MSD granted Metro Mobile a license to provide cellular service on Block A frequencies in the Phoenix MSA on October 5, 1984. On December 14, 1988, Metro Mobile filed an application to expand its service in three cells in the Phoenix Metropolitan Statistical Area (MSA) (the "three cell application").[3] This form 401 application was a major modification to Metro Mobile's Phoenix system because it entailed an expansion of Metro Mobile's Cellular Geographic Service Area (CGSA).

3. After the application appeared on public notice, January 23, 1989, McElroy filed a petition to deny the three cell application. The petition to deny alleged that Metro Mobile had failed to comply with the requirements of Section 22.913 of the Commission's Rules (and related provisions) governing the content of FCC form 401 applications.[4] McElroy filed a competing application in January 1989 against which Metro Mobile filed a petition to deny.

4. On March 10, 1989 Metro Mobile filed a major amendment to the three cell application to expand the CGSA by adding or modifying seven new cells in addition to the three cells to be affected by the three cell application (the "ten cell application").[5] The ten cell application did not appear on public notice. McElroy's application and both of Metro Mobile's applications were returned to the respective applicants in April 1989. McElroy's application

[1] Under the provisions of Section 1.106(a)(1) of the Commission's Rules, this case was referred for review to the Commission by the Common Carrier Bureau. 47 C.F.R. § 1.106 (a)(1).

[2] The Phoenix transfer application is file no. 02886-CL-TC-1-92. The Windham transfer application is file no. 02888-CL-TC-1-92. The Tucson transfer application is file no. 02893-CL-TC-1-92.

[3] Metro Mobile application file number 02521-CL-MP-89, filed Dec. 14, 1988. The application proposed adding two cells: a cell at Burnt Mountain and a cell at Oatman Mountain; and enlarging the service area of a cell at Fountain Hills.

[4] The specific provisions McElroy alleged that Metro Mobile violated include: § 22.913(a); § 22.903(a); § 22.917; § 22.905, and § 22.13 (a)(1)-(4). On March 8, 1989 Metro Mobile filed a minor, curative amendment to its three cell application. The amendment corrected the defective map Metro Mobile submitted with its three cell application, but failed to address the other defects enumerated by McElroy.

[5] This application, file no. 04376-CL-MP-89, proposes the following actions: modifying the service areas of Cell 14 - White Tank Mountains, Cell 17 - Fountain Hills, Cell 24 - Burnt Mountain, and Cell 25 - Oatman Mountain; and adding Cells 23, 26, 27, 28, 29 and 30 - Adobe Mountain, New River, Morristown, Gila Bend, Freeman Road, and Mt. Ord, respectively. With its amendment, Metro Mobile filed a request that its major amendment be accepted notwithstanding any provision of Section 22.918 of the Commission's Rules which might otherwise bar a major amendment to a major modification. Alternatively, Metro Mobile requested that its ten cell application be substituted for the earlier filed three cell application. This request has not yet been addressed by the Common Carrier Bureau.

was returned after the issuance of a Bureau Order, *Cellular Applications for Unserved Areas in MSAs and NECMAs*, 4 FCC Rcd 3636 (1989) (the "April 10 Order") which returned untimely filed unserved areas applications.[6] Metro Mobile's applications were returned by letter dated April 13, 1989.

5. On May 15, 1989, Metro Mobile filed a petition for reconsideration of the dismissal of its three cell and ten cell applications,[7] requesting that the applications be reinstated. The MSD effectively reinstated both applications, but it did not place the resubmitted ten cell application on public notice.[8]

6. On October 9, 1991, the MSD granted Metro Mobile's three cell application. However, the MSD did not issue an Order resolving McElroy's petition to deny that application.[9]

7. In November 1991, Metro Mobile filed applications to transfer its cellular licenses to Bell Atlantic. One of those applications was for the Phoenix MSA. After the transfer application appeared on public notice in December 1991, McElroy filed a petition to deny the transfer alleging, *inter alia*, that the transfer could not proceed until the underlying problems with Metro Mobile's license in Phoenix were resolved. The MSD issued an Order on March 3, 1992, granting the transfer application "conditioned upon whatever action the Commission may take as a result of McElroy's pending appeal," *Metro Mobile CTS, Inc.*, 7 FCC Rcd 1822 (Mobile Serv. Div. 1992) (*MSD March 3 Order*), but denying McElroy's petition in all other respects.

8. McElroy filed petitions for reconsideration of the *MSD March 3 Order* and the grant of the three cell application.

9. The D.C. Circuit Court recently ruled on McElroy's and others' appeals of the dismissal of their competing unserved areas applications in the Phoenix MSA in the *Remand Order*, *see supra* note 6. The Court held that the Commission had not effectively barred acceptance of unserved area applications at the time McElroy and others filed in Phoenix. The court ordered the Commission to reinstate McElroy's and JAJ's applications in Phoenix *nunc pro tunc*. Accordingly, we are reinstating *nunc pro tunc* as of the dates that the applications were originally filed McElroy's application file no. 02639-CL-MP-89, which was filed January 17, 1989, and JAJ Cellular's application file no. 02905-CL-MP-89, which was filed March 22, 1989.[10]

B. The Three Cell Grant

10. Upon review, we have concluded that the MSD's grant of the three cell application was not valid because it violated Section 309(d) of the Communications Act, 47 U.S.C. § 309(d). That provision requires that the Commission issue a statement resolving pending petitions before granting the attendant pending applications. As we have noted, the MSD failed to address McElroy's petition against the three cell application. Accordingly, we grant the McElroy petition for reconsideration and set aside the MSD's grant of the three cell application as invalid.

11. In setting aside the three cell grant, the application is returned to pending status. This application will remain pending along with the ten cell application.[11] Because of the D.C. Circuit's recent decision reinstating *nunc pro tunc* McElroy's and others' applications in Phoenix, action on Metro Mobile's three cell and ten cell applications, and the competing applications, will be handled in a separate proceeding.

C. McElroy's Petition for Reconsideration of the Phoenix Transfer

12. McElroy argues that the underlying procedural defects concerning the Phoenix license should prevent the transfer. Because we are setting aside the three cell grant, we grant reconsideration, in part, of the MSD's approval of the Phoenix transfer and modify the MSD's decision by deleting the three cells from the authorization transferred.[12] Furthermore, we note that Metro Mobile did not transfer

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[6] McElroy filed a petition for reconsideration of the April 10 Order. In the *First Report and Order on Unserved Areas*, 6 FCC Rcd 6185 (1991), we rejected McElroy's petition, and it appealed. The Court of Appeals for the District of Columbia recently held that the Commission erred in dismissing McElroy's application, as well as others for the Phoenix MSA. *McElroy v. F.C.C.*, No. 91-1545, slip op. (D.C. Cir. April 23, 1993) (the *Remand Order*).

[7] Metro Mobile's filing was in the form of a letter to the Mobile Services Division requesting that it reverse the dismissal of the applications, which Metro Mobile alleged was in error. Although not formally titled a Petition for Reconsideration, that was the action requested.

McElroy argues in some of its various petitions that it was denied due process, in part, because Metro Mobile failed to serve its Petition for Reconsideration on McElroy as Section 22.23(d) of our Rules might seem to require. We need not resolve that question because ultimately there was no harm. McElroy had already petitioned against the three cell application, and that petition remained pending. Further, McElroy had an opportunity to review the ten cell application and file a petition against it after the application appeared on public notice on March 5, 1992. Public Notice, Report No. 92-CL-59, released Mar. 5, 1992. McElroy availed itself of that opportunity. Therefore, to the extent that the purpose of Section 22.23(d) is to protect the rights of petitioners against new filings, McElroy's right was protected by the subsequent public notice.

[8] While the MSD did not formally grant Metro Mobile's Petition for Reconsideration, the effect of its subsequent actions in further processing both applications was a de facto grant of reconsideration and reinstatement of the applications. For procedural reasons, however, we are now ruling on Metro Mobile's Petition for Reconsideration by granting reconsideration.

[9] The MSD also issued authorizations for ten cells, not just three in October 1991. On February 28, 1992, the MSD issued a public notice which clarified that the October 9, 1991 grant of file no. 02521-CL-MP-89 was only a grant of the three cell application, as the ten cell application had never appeared on public notice as required by Section 309 of the Communications Act, 47 U.S.C. § 309. When Metro Mobile filed an amendment, in February 1992, to its transfer of control application in Phoenix, file number 02886-CL-TC-1-92, it corrected its transfer application to show only the three cells present in the December 14, 1988 three cell application which had been on public notice. With its February 26, 1992 amendment, Metro Mobile returned the erroneously issued authorizations for the contested areas of the ten cell application with a statement that it had no legal rights to those areas at that time.

[10] The staff has separately reinstated the other applications that were the subject of the court remand. *Public Notice*, Report No. CL-94-14, Released November 14, 1993.

[11] McElroy's petitions to deny the three cell application and the ten cell application will be addressed at the time we process those applications.

[12] The three cell application was for cell sites at Burnt Mountain, Oatman Mountain, and Fountain Hills.

any of the area in the now-contested ten cell application. *See supra* footnote 5. Accordingly, we modify the *MSD March 3 Order* to reflect that Metro Mobile transferred to Bell Atlantic the license it held in Phoenix excluding any areas covered by the three cell application. Because the *MSD March 3 Order* did not address pending applications we will address them herein. We deem the reinstated, pending applications to reflect the change in ownership which resulted from the transfer of control from Metro Mobile to Bell Atlantic. Therefore, for file nos. 02521-CL-MP-89 and 04376-CL-MP-92, Bell Atlantic is to be considered the applicant. We take this action under the authority of Section 22.23(c)(4), which allows this type of amendment.

13. Since Metro Mobile was granted authority in October 1991 to operate the three cells in the three cell application, it has constructed those cells and has begun service to the public.[13] In light of our rescission of Metro Mobile's three cell grant, service to the public will cease unless we take further action pending consideration of Metro Mobile's three cell and ten cell applications, and the mutually exclusive applications filed by McElroy and JAJ Cellular. We faced a similar situation in *La Star Cellular Telephone Company*, 4 FCC Rcd 3777 (1989), *aff'd*, 899 F.2d 1233 (D.C. Cir. 1990). For similar reasons, we conclude that "the public interest strongly supports and requires" grant of interim operating authority to Bell Atlantic, the transferee, pursuant to Section 22.32(g) of our rules. *See La Star*, 4 FCC Rcd at 3780.[14] Such authority shall continue in effect until a permanent licensee is selected and ready to operate. This grant of interim operating authority is without prejudice to future action on any of the reinstated applications filed by Metro Mobile, McElroy, or JAJ Cellular in the Phoenix MSA.

III. WINDHAM RSA (CONN-2) - TRAFFICKING

14. REO, a minority partner with Metro Mobile in the Tucson MSA, filed a petition to deny the transfer of the Tucson market arguing that Metro Mobile had been trafficking in licenses, that Bell Atlantic was not financially qualified to acquire these licenses, and that Metro Mobile's breach of its fiduciary duty to its minority partner, REO, disqualified Metro Mobile as a Commission licensee. The MSD denied REO's petition to deny on every point. Subsequently, REO filed two petitions for reconsideration, one against the transfer of the Connecticut-2 Windham RSA (Conn-2), and one against Tucson, *see infra*.

15. REO argues in its petition for reconsideration of the transfer of the Connecticut 2 Windham (Conn-2) facility that the transferor, Metro Mobile, was trafficking in licenses in violation of the Commission's Rules.[15] REO requests that we designate the trafficking issue for a hearing.

16. Bell Atlantic and Metro Mobile argue that we should dismiss REO's petition for reconsideration for lack of standing. Metro Mobile's argument is based on the fact that REO has no financial interest in Conn-2. Metro Mobile characterizes REO's standing argument as an attempt to establish standing because the MSD consolidated the applications being transferred into one Order.

17. Metro Mobile's argument that REO lacks standing fails. According to Section 405 of the Communications Act, 47 U.S.C. § 405, if an entity was a party to the proceeding below, it will have standing to file for reconsideration. REO was a party to the proceeding below. In its petition to deny the Tucson MSA transfer REO alleged that Metro Mobile was "seeking to transfer . . . construction permits for South Carolina RSA 3 (file no. 02879-CL-TC-1-92), South Carolina RSA 9 (file no. 02882-CL-TC-1-92), Rhode Island RSA 1 (file no. 02885-CL-TC-1-92), and *Connecticut RSA 2* (file no. 02888-CL-TC-1-92)." REO, Petition to Deny, file no. 02893-CL-TC-1-92, filed January 9, 1992 at 22 (emphasis added). The MSD decision addressed the substance of REO's trafficking argument for all four markets when it stated that it found no trafficking concerning the four transfer applications to which REO referred in its petition to deny.[16] One of the markets the MSD addressed in the *MSD March 3 Order* was Conn-2. Therefore, we reject Metro Mobile's argument and find that REO has standing to petition for reconsideration of the MSD's action regarding Conn-2 since it was a party to the proceeding below.

18. REO argues that because the Conn-2 facilities were not constructed at the time the transfer application was filed, Metro Mobile was trafficking in unbuilt facilities[17] and the transfer application should never have been granted. Metro Mobile avers that although construction of the system was not completed at the time it filed this assignment application, it completed construction and commenced operation before the transfer application was granted. Therefore, according to Metro Mobile, the Section 22.40(b) issues were rendered moot.

19. On January 8, 1992, Metro Mobile filed an FCC Form 489[18] notifying the Commission that it had completed initial construction of the proposed facilities and that it would "commence operations . . . on January 8, 1992, or in any event no later than January 13, 1992." *See*

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[13] Metro Mobile, FCC Form 489 Notification of Status of Facilities, filed Mar. 13, 1992.t

[14] We instruct the staff to begin processing the mutually exclusive applications expeditiously so that the period of interim operating authority will be as short as possible.

[15] See 47 C.F.R. §§ 22.40, 22.920.

[16] Metro Mobile challenged REO's standing to file a petition to deny the Tucson MSA license in the proceeding below. It did not raise the question of standing against REO with regard to the four markets in which REO alleged Metro Mobile was trafficking, including Conn-2.

[17] According to Section 22.40(b) of the Commission's Rules:

> The sale of a cellular construction permit will only be permitted after a showing that the transferor is not speculating in cellular licenses. The burden of proof is on the transferor. See also Section 22.920.

47 C.F.R. § 22.40(b). Section 22.920 of the Rules provides that the provisions of Section 22.40 shall not apply to the assignment of "[c]ellular licenses (*i.e.*, constructed stations) obtained by random selection."

[18] *See* 47 C.F.R. § 22.43(c)(2) (in effect at the time Metro Mobile filed its application) ("For systems beyond the top-90 markets, construction of an initial phase of the system, which may consist of one or more cells, must be completed, and a notification on Form 489 that the system is ready to commence

Metro Mobile FCC Form 489.[19] The MSD granted Metro Mobile's assignment application in March 1992, after Metro Mobile commenced operating in Conn-2.

20. The anti-trafficking provisions of Section 22.40(b) of the Rules are inapplicable to applications to assign constructed cellular stations obtained by random selection.47 C.F.R. § 22.920. When an applicant is transferring constructed facilities, as Metro Mobile was, and the license for those facilities was obtained by random selection, as the Conn-2 license was,[20] Section 22.920 of our Rules applies. 47 C.F.R. § 22.920. Therefore, the anti-trafficking provisions of Section 22.40(b) of the Rules are inapplicable to Metro Mobile's assignment application. As a result, we find that REO failed to establish any grounds warranting reconsideration of the MSD's previous decision.

IV. TUCSON MSA - FINANCIAL QUALIFICATIONS

21. In challenging Bell Atlantic's financial qualifications in its petition for reconsideration of the grant of the transfer of the Tucson license, REO argues that Bell Atlantic's application was defective because Bell Atlantic did not provide the "relevant" facts necessary for the MSD to determine whether Bell Atlantic was financially qualified Indeed, REO asserts, REO itself provided some of the information necessary for such a determination in its own pleadings.[21] REO alleges that the MSD simply accepted BAC's "well known" financial qualifications, and that the MSD followed the same course here that it did in the Portland MSA in failing to scrutinize a Regional Bell Operating Company. *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164 (D.C. 1990). REO alleges that the MSD "rubber-stamped" the financial qualifications of Bell Atlantic without making a finding based upon adequate information that Bell Atlantic had a reasonable assurance of available funds.

22. Section 22.917(d) of the Commission's Rules requires that:

> each application for an assignment of a license (or permit), or for the transfer of control of a corporation holding a license (or permit), shall demonstrate the financial ability of the proposed assignee or transferee to acquire and operate the facilities by submitting adequate financial information under the guidelines specified in this section, as appropriate.

47 C.F.R. § 22.917(d). We have previously stated that the requirement that the applicant demonstrate the financial ability to operate the station for one year refers to unbuilt facilities. *See Kile*, 5 FCC Rcd 513, 514 (1990). In a case like the one before us, in which an operational facility is sought to be transferred, a transferee need only show a reasonable assurance of its ability to finance the acquisition. *See Kile*, 5 FCC Rcd 513 (1990).[22] The MSD found Bell Atlantic to be financially qualified. For the reasons discussed below, we find that the MSD decision was correct.

23. REO's reliance on *Northeast* is misplaced. In *Northeast*, Portland Cellular Partnership (NYNEX), an applicant to construct a cellular system in the Portland, Maine MSA in which NYNEX Mobile Communications was a general partner, was challenged on the ground that its application was defective for failing to contain specific financial information required in Section 22.917(b) of our Rules. The court found that the application did not comply with the requirements of Section 22.917(b) and found that the Commission did not have cause to grant a waiver to NYNEX. Thus, NYNEX's application was defective on its face and so was unacceptable for filing.

24. In contrast, in this case, REO admits in its petition for reconsideration that the provisions of 22.917(d) give only guidelines regarding the information that may be part of a transferee-applicant's financial showing.[23] REO questions whether Bell Atlantic provided sufficient relevant information which, in REO's view, was necessary for the MSD to determine whether Bell Atlantic was financially qualified.[24] Thus, here we do not have an acceptability issue as in *Northeast*.

25. Rather the issue is whether the applicant is financially qualified. Based upon the information now before us, it is clear that Bell Atlantic has a reasonable assurance of available funds to dedicate to this transaction. See *Kile*, 5 FCC Rcd at 514 (citing *CNCA Acquisition Corporation*, 3 FCC Rcd 6088 (1988)).

26. Bell Atlantic submitted BAC's consolidated balance sheet and consolidated income statement which gave the MSD information to analyze the transferee's financial condition. *See* Metro Mobile Application, file no. 02893-CL-TC-1-92, Ex. II at 7. REO submitted, with its petition for reconsideration in file no. 02888-CL-TC-1-92, for the Connecticut 2 RSA, a copy of the prospectus for the Metro Mobile/Bell Atlantic merger. In addition, REO submitted, with its petition to deny, the Securities and Exchange Commission (SEC) Form 10K filing made by Metro Mobile. Thus, on reconsideration, the Commission has before

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service to the public must be filed, within 18 months from the date the radio station authorization is granted."); *see also Amendment of the Commission's Rules to Reduce the Construction Period for Cellular Communications Systems, Report and Order*, 60 Rad. Reg. 1311, 1313 (1986).

[19] *See* Public Notice, Report No. CL-92-45, released Feb. 3, 1992. (Bureau announces that Metro Mobile "filed the initial license to cover the construction permit [FCC Form 489 Notification of Status of Facilities on January 8, 1992.]").

[20] See, Public Notice, Report No. CL-90-295, released Aug. 30, 1990.

[21] *See* REO, Petition to Deny filed January 9, 1992 at exhibit 1, and REO, Petition for Reconsideration filed April 2, 1992 at exhibit 2.

[22] A transferee not relying on internal financing may demonstrate its financial ability by filing a financial commitment letter. A transferee intending to rely on internal financing is required to submit sufficient financial information for the Commission to be able to determine the financial fitness of the transferee. That information must include a balance sheet. If the balance sheet is insufficient, we may require additional information, such as income statements, statements of projected revenues, expense statements, or statements of projected sources of funds. *Kile*, 5 FCC Rcd at 514.

[23] REO, Petition for Reconsideration of the grant of file no. 02893-CL-TC-1-92, filed April 2, 1992, at para. 8 and n.15.

[24] REO, Petition for Reconsideration, *supra*, at para. 10.

it the consolidated balance sheet, consolidated income statement, Metro Mobile's Form 10K and the prospectus regarding this proposed merger, which provided additional information to review the financial qualifications. In the prospectus, Bell Atlantic and Metro Mobile set forth historical consolidated financial data of each entity and a pro forma combined financial statement of the proposed combined entity.

27. In this case, the merger will not diminish the combined parties' prior financial qualifications. The transaction consisted of a stock for stock transfer and assumption of debt and adjustments at closing. The stock for stock transfer called for Bell Atlantic to transfer its stock to Metro Mobile's shareholders taking Metro Mobile stock in return. Then, Metro Mobile would be dissolved. The stock for stock transfer, which would use either treasury or authorized, unissued stock, did not require cash funding by Bell Atlantic, and therefore it will not impair Bell Atlantic's ability to finance this transaction. Thus, the value of the stock exchanged, $1.6 billion, properly is excluded from our review of Bell Atlantic's financial qualifications.

28. Metro Mobile had $874 million in debt. The transaction would require at most $25 million in adjustments and stock valued at $1.6 billion. The total value of the transaction was $2.5 billion. Since we exclude the value of the stock for stock transfer ($1.6 billion), we will only look at the value of the debt and adjustments. Thus, the value of the transaction we are reviewing is $900 million.

29. The consolidated income statement shows net income of $1.091 billion for the nine months ending September 30, 1991 and total operating revenues of $9.181 billion. These figures represent adequate coverage of the interest expense of this transaction. These factors, in combination with the consolidated balance sheet of BAC, which shows assets totaling nearly $28 billion and equity of over $9 billion, reflect that the book equity[25] for the resulting company will be greater than the liability assumed. *Cf. Tel-Page Corp. of Wisconsin*, 74 FCC 2d 370 (1979). When we look at all of these factors together, it is clear that the transferee is financially qualified to acquire the transferor. Moreover, with its opposition to REO's petition to deny this transfer, Bell Atlantic submitted a letter from the vice president-chief financial officer of BAC in which he committed, as necessary, all of the resources of BAC to the merger.[26]

V. CONCLUSION AND ORDERING PARAGRAPHS

30. Accordingly, we hereby modify the *MSD March 3 Order* in part, and affirm the *MSD March 3 Order* in part as set forth below.

31. IT IS HEREBY ORDERED THAT the grant of the Metro Mobile CTS of Phoenix application, file no. 02521-CL-MP-89, IS RESCINDED.

32. IT IS FURTHER ORDERED THAT the applications for system modification filed by Metro Mobile CTS of Phoenix, file nos. 02521-CL-MP-89 and 04376-CL-MP-92, ARE REINSTATED *NUNC PRO TUNC*.

33. IT IS FURTHER ORDERED THAT, pursuant to the order of the D.C. Circuit Court, McElroy Electronics, Inc.'s application file no. 02639-CL-MP-89 and JAJ Cellular's application file no. 02905-CL-MP-89 ARE REINSTATED *NUNC PRO TUNC* as of the dates originally filed.

34. IT IS FURTHER ORDERED THAT the applications for system modification filed by Metro Mobile CTS of Phoenix, file nos. 02521-CL-MP-89 and 04376-CL-MP-92 ARE AMENDED to reflect Bell Atlantic Enterprises, Inc. as the applicant.

35. IT IS FURTHER ORDERED THAT the Petition for Reconsideration, filed by Metro Mobile CTS of Phoenix, of the dismissal of its applications in Phoenix, file no. 02521-CL-MP-89 and file no. 04376-CL-MP-92, IS GRANTED.

36. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by McElroy Electronics Corporation of the grant of file no. 02521-CL-MP-89, as reflected in Public Notice Report No. CL-92-5A, IS GRANTED.

37. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by McElroy Electronics Corporation against the transfer of the Phoenix, Arizona, Metropolitan Statistical Area from Metro Mobile CTS, Inc., to Bell Atlantic Enterprises, Inc., IS GRANTED, to the extent described herein.

38. IT IS FURTHER ORDERED THAT the *MSD March 3 Order* IS MODIFIED to reflect that Metro Mobile CTS of Phoenix has not transferred to Bell Atlantic Enterprises the areas in file no. 02521-CL-MP-89, Oatman Mountain, Burnt Mountain and Fountain Hills.

39. IT IS FURTHER ORDERED THAT Bell Atlantic IS GRANTED INTERIM OPERATING AUTHORITY for the Burnt Mountain, Oatman Mountain, and Fountain Hills cells according to the parameters set forth in file no. 02521-CL-MP-89 until such time as a permanent licensee is selected and ready to operate.

40. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by Radio Enterprises of Ohio against the transfer of the Connecticut Rural Service Area from Metro Mobile CTS, Inc., to Bell Atlantic Enterprises, Inc., file no. 02888-CL-TC-1-92, IS DENIED.

41. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by Radio Enterprises of Ohio against the transfer of control of the Tucson, Arizona, Metropolitan Statistical Area from Metro Mobile CTS, Inc., to Bell Atlantic Enterprises, Inc., file no. 02893-CL-TC-1-92, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William Caton
Acting Secretary

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[25] Book equity appears on BAC's consolidated balance sheet as shareowners' investment. File No. 02893-CL-TC-1-92, exhibit II.

[26] "BAC has been and remains committed to providing all financial support necessary to discharge Metro Mobile's outstanding indebtedness in connection with the closing of the acquisition." Declaration of William O. Albertini, Vice President-Chief Financial Officer of BAC, signed January 17, 1992, Metro Mobile and Bell Atlantic, Joint Opposition to Petition to Deny, filed January 21, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MD Docket No. 93-297

In the Matter of

The Establishment of Commission
Rules concerning the Administration
of Accounting Authorities in
the Maritime Mobile and the Maritime
Mobile-Satellite Radio Services Except
for Distress and Safety Communications

NOTICE OF PROPOSED RULEMAKING

Adopted: November 19, 1993; Released: December 17, 1993

Comment Date: February 3, 1994
Reply Comment Date: February 18, 1994

By the Commission:

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I. INTRODUCTION

1. By this action we propose to establish regulations for the administration of accounting authorities in the maritime mobile and the maritime mobile-satellite radio services except for distress and safety communications. We seek comment on the proposals set forth here as well as alternative proposals that commenters may have.

II. BACKGROUND

2. International telecommunications settlements involve the collection and payment by various accounting entities of charges due foreign administrations for messages transmitted at sea by or between maritime mobile stations located on board ships subject to U.S. registry and utilizing foreign coast and coast earth station facilities. The United States Government has performed accounting settlements for maritime mobile service message charges since 1913 and, more recently, for maritime mobile-satellite service messages. Under the provisions of Service Regulation XXXVI of the Berlin-Telegraph Convention of 1906 and the London Radiotelegraph Conference of 1912, to which the U.S. is a signatory, each Administration is required to provide for the collection of all tolls for the radiotelegraph traffic exchanged with stations of other Administrations. The proceedings of the London Convention Final Protocol (Part II Treaty Series, No. 58) were ratified by the Senate on July 8, 1913.

3. To comply with its treaty obligation, it became necessary for the U.S. to establish a clearinghouse to maintain accounts with each foreign administration concerned and with U.S. flag vessels operating in international or foreign waters. In accordance with Article XLII of the Service Regulations affixed to the London Conference, the Department of Commerce was authorized by the Senate to enforce all radio laws of the U.S. as well as the provisions of the Conference of 1912. By agreement between the Secretary of War, the Secretary of Commerce and the Secretary of State on March 19, 1913, the Navy Department was authorized to handle the settlement of international radio accounts.

4. On July 1, 1924, by authority of the General Appropriation Act of the Department of Commerce, FY 1925 (43 Stat. 220, PL 68-153 - Title III), the personnel and equipment of the International Radio Accounting Unit, Navy Department, together with all outstanding accounts owed to foreign administrations were transferred to the Bureau of Navigation, Department of Commerce.

5. On February 23, 1927, the Radio Division of the Bureau of Navigation, where the international radio accounts due foreign administrations were being processed, was transferred from the Bureau of Navigation and put directly under the supervision of the Secretary of Commerce by the Radio Act of 1927 (PL 69-632). The Radio Division was subsequently abolished on July 10, 1932, and its duties, powers, personnel, equipment and records were transferred to the Federal Radio Commission by authority of PL 212-72 and by Executive Order 5892. The international radio accounts were, by this authority, put under the jurisdiction of the Federal Radio Commission where they remained until 1934.

6. On June 10, 1934, the Federal Radio Commission was absorbed by the Federal Communications Commission, which had been created by the Communications Act of 1934, Title VI, Section 603 and Section 604 of the Act provided for the transfer of all employees, records, property, authorities and appropriations from the Federal Radio Commission to the Federal Communications Commission. At that time the international radio accounts were transferred to the jurisdiction of the Commission, where they are now maintained.

7. The subjects of international telecommunications accounting and settlements are addressed in the International Telecommunication Convention (Nairobi, 1982), in the International Telecommunication Regulations (Melbourne,

1988) (ITR), in the ITU Radio Regulations and in the CCITT Recommendations.[1] The CCITT develops technical, operational and service recommendations applicable to essentially all international telecommunications services via wire and radio. Provisions of Conventions and Regulations have treaty status and are therefore binding on the parties thereto. The CCITT Recommendations do not have treaty status and are not legally binding. However, as a practical matter, the CCITT Recommendations are effectively the standards that govern international telecommunications.[2]

8. Historically, most international settlements were handled solely between individual ship owners and foreign administrations or coast stations. This meant that, in most countries, there were literally thousands of addresses to which administrations would have to forward their invoices. A major exception was within the U.S. where the FCC had acted as a nationwide clearing house for the settlement of accounts since its inception in 1934.

9. The World Administrative Radio Conference (Geneva, 1979) changed the procedures governing accounting practices in the maritime mobile and maritime mobile-satellite services, partly in response to the perceived need to improve the efficiency of the international telecommunication settlements system. The Final Acts of the Conference, ratified by the U.S. Senate on October 27, 1983, revised Chapter IX of the international Radio Regulations by establishing a new Article 66 which set forth the following general principles to govern the international accounting for public correspondence in the maritime mobile and maritime mobile-satellite services:

5086	§2.	Charges for radiocommunications from ship to shore shall in principle, and subject to national law and practice, be collected from the maritime mobile station licensee:
5087	a)	by the administration that has issued the license; or
5088	b)	by a recognized private operating agency; or
5089	c)	by any other entity or entities designated for this purpose by the administration referred to in No. 5087.

10. The Mobile World Administrative Radio Conference in 1987 passed a resolution (contained in the Regulations as Resolution No. 334) providing that the provisions of Article 66 should merely refer to the International Telecommunication Regulations (ITR), assuming that the World Administrative Telegraph and Telephone Conference (WATTC-88) placed the substance of the Article 66 provisions into the ITR. The WATTC-88 did incorporate these provisions into the ITR (effective July 1, 1990). We assume a future competent Radiocommunication Conference will eventually implement the provisions of Resolution No. 334. In any event, both the current Radio Regulations and the ITR provide that the CCITT Recommendations are to be taken into account when applying the international regulatory provisions. As it now stands, the implementing recommendations developed by the CCITT include: (1) Rec. D.90 on charging, accounting and refunds; (2) Rec. D.195 on settlement of international telecommunication balances of accounts; (3) Rec E.200 on operational provisions for maritime mobile services; (4) Rec. F.100 on mobile operational provisions; and (5) the newest recommendation adopted, Rec. F.111 on principles of service for mobile systems.

11. The organization within the FCC responsible for the settlement of maritime mobile and maritime mobile-satellite accounts with foreign administrations is the International Telecommunications Settlements (ITS) Section of the Financial Management Division, Office of Managing Director. The settlement operation basically consists of examining and processing invoices received from foreign administrations to ensure the validity of the charges and, in turn, billing U.S. shipowners for the charges due the foreign country. The accounts generally contain the ship call sign and name, the date the message was transmitted, the number of words or minutes, the cost per word or minute in gold francs or Special Drawing Rights (SDRs) and the amount due shown in either gold francs or SDRs. Collections are then processed and appropriate payments made to the foreign countries or their agents through the U.S. Treasury. The Commission, as one of 15 Accounting Authorities currently recognized by the FCC, expects to process 340,000 separate charges from as many as 100 entities during the next twelve months, with estimated collections totaling $12.0 million. The settlement clearinghouse service was performed by the FCC at no cost to licensees until December 19, 1989 when Public Law 101-239 established a $2.00 per line item administrative fee applicable to all ITS billings.

12. The FCC, in accordance with international procedures described infra, has also permitted private entities, called "accounting authorities", to settle accounts between U.S. registered ships and foreign administrations just as the Commission does. (See *In The Matter of Accounting and Operating Procedures in the Maritime Mobile Service, FCC 80-741, Mimeo No. 28600 (released December 12, 1980).)* In addition, the accounting authority may settle accounts of foreign licensed vessels either exclusively or in addition to settling U.S. accounts. Vessel operators/licensees choosing to have these private entities settle their accounts are generally also charged a fee under some sort of contractual

[1] "CCITT" is the French acronym for the International Telegraph and Telephone Consultative Committee within the International Telecommunication Union (ITU). "CCITT" is nevertheless the recognized acronym used in most languages - including English.

[2] At the ITU Additional Plenipotentiary Conference (APP) in Geneva (December 1992), the structure, working methods, and construct of the basic ITU treaty instrument were modified. The result from this is that the names of the sub-entities of the ITU will change (e.g., the CCITT will become the Telecommunication Standardization Sector - TSS and the new primary treaty instruments will become the ITU Constitution and the ITU Convention (with consequential renumbering of all provisions). We note that the changes coming from the APP were placed into provisional effect on March 1, 1993; however, since the formal entry into force of these changes is not until July 1, 1994 (as between those ITU Member countries who have ratified or acceded to the new instruments), we will refer to the familiar, existing ITU nomenclatures and documents for convenience and ease of understanding in this instant proceeding.

arrangement. In certain cases, the vessels are owned and/or operated by the same company that is acting as an accounting authority.

13. Accounting authorities have been established or certified by the Commission in accordance with the procedures delineated in the CCITT Recommendations. Those procedures allow administrations to establish up to 25 accounting authorities per country. Specifically, accounting authorities are designated by the assignment of an individual Accounting Authority Identification Code (AAIC). This code is used by ships and foreign coast stations to identify where charges for messages transmitted through foreign facilities are to be sent for collection. All accounting authorities approved by the Commission to settle maritime accounts for U.S. licensed vessels are assigned a discrete four-character alpha-numeric code. Accounting authorities operating in the U.S. are assigned codes with a "US" prefix. Currently, only eight codes beginning with the prefix US are authorized, including US01 which is used by the Commission's ITS Section in its settlement activities.[3] Foreign-based accounting authorities may also be certified to settle accounts of U.S. licensed vessels. If approved, they use the AAIC originally assigned to them by their country of origin. The Commission has currently certified seven foreign-based accounting authorities[4] to settle accounts for U.S. flag vessels. Although all certifications have technically been interim certifications, twelve years have elapsed since the original interim assignments.

14. Because the entities authorized AAICs by the Commission have generally been cooperative with the FCC and are familiar with maritime accounting issues, the Commission has had few problems with accounting authorities that have not been resolved satisfactorily. We believe, however, that the responsibilities of accounting authorities should be spelled out and that their settlement activities should be monitored to ensure applicable international procedures are being followed.

15. There are currently *no* rules, formal guidance or procedures issued by the Commission for determining who should be certified as an accounting authority. There are *no FCC standards* of conduct for accounting authorities nor any requirement to keep the Commission informed of their activities. There are *no rules to ensure* that the overall United States settlement activity is pursued in accordance with established procedures. We believe that at least minimal regulations should be in place to assist current and future accounting authorities in adhering to those international procedures as a matter of public interest and in fulfillment of U.S. treaty interests.

16. To that end, this Notice proposes rules that would establish an application and approval process for becoming an accounting authority to ensure that only qualified applicants perform this function. The application process and procedural rules would also apply to entities currently settling accounts under interim Commission certification. The interim certification will be cancelled 60 days after the effective date of these rules if these entities do not follow the application process. The Notice also proposes standardized operational procedures and reporting mechanisms that would assist the Commission in monitoring the overall settlement function. The proposed rules declare an FCC rule for using the accounting authority's receipt date of accounts for purposes of determining the appropriate conversion rate for the Special Drawing Rights (SDRs). The proposed rules also establish procedures to govern situations where an accounting authority is not operating in accordance with Commission or established international procedures.

17. The Notice proposes rules to ensure compliance in situations where the licensee fails to remit proper and timely payment for public correspondence communications to the Commission or to another accounting authority. Finally, the proposed rules declare that the ship station licensees are *ultimately liable* for the proper and timely payment of public correspondence communications.

III. GENERAL DISCUSSION OF THE PROPOSED RULES

18. **Eligibility.** We propose that U.S. citizenship requirements not be imposed on accounting authorities. We propose, instead, certain restrictions regarding the physical location of accounting authority settlement facilities for those accounting authorities wishing to be assigned an Accounting Authority Identification Code with a "US" prefix. These sections also make it clear that prior experience in accounting or settlement activities will be considered but is not a prerequisite to becoming an accounting authority. Applicants must be willing and able to accept clients at a reasonable charge; must agree to settle accounts in both gold francs and Special Drawing Rights (SDRs) and to use the conversion rate mandated by the International Monetary Fund; and must agree to conduct operations in accordance with applicable FCC policies and rules, the International Telecommunication Regulations and other international rules, regulations, agreements, and, where appropriate, CCITT Recommendations. Finally, these sections require that all entities intending to settle accounts of U.S. licensed vessels obtain prior Commission authorization to do so.

19. **Application Procedures.** The proposed rules require the filing of an original FCC application form (See Exhibit 1.) in order to be considered as an accounting authority. We have attempted to keep the application form simple and streamlined, yet comprehensive enough to provide sufficient information on which to base a decision as to whether to certify an applicant as an accounting authority. The proposed rules request only basic information identifying the applicant and describing the applicant's objectives and capabilities with respect to the accounting authority function. To ascertain the latter, we are requesting that any relevant experience of an applicant be detailed and that the applicant's proposed settlement plans be provided. To obtain basic information about the applicant, we are requesting information regarding the proposed structure of the

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[3] Besides the FCC, the other Accounting Authorities assigned a "US" code are: Mackay Communications, Inc.; Radio-Holland, USA; SAIT Communications, Inc.; Mobile Marine Radio, Inc.; Exxon Communications Company; Raytheon Service Company and Global Communications, Inc.

[4] The following foreign companies have been approved as Accounting Authorities: Kelvin Hughes Ltd (England); Peninsular Electronics Ltd (England); STC International Marine, Ltd. (England); Marconi International 0* Marine Co., Ltd. (England); E.B. Communications Ltd (England); International Radio Traffic Services (Ireland) and ANDgate Ltd. (Gibraltar).

applicant's settlement business and similar background data which, in combination with our request for documents demonstrating financial responsibility, should provide an adequate basis for determining whether to issue a certification.

20. We propose to process applications on a first-come, first-served basis. However, the Commission is proposing to "grandfather" all current accounting authorities as long as they are otherwise qualified and follow the procedures established by the rule to obtain permanent accounting authority authorizations. Existing accounting authorities are not exempt from the new application procedures and would be required to apply for permanent accounting authority certifications within 60 days of the effective date of these rules or risk losing their status as accounting authorities.

21. The proposed rules establish an FCC policy that a minimum of 15 of the available 25 Accounting Authority Identification Codes (AAICs) be reserved for use by accounting authorities conducting settlement operations in the United States. Those accounting authorities proposing to conduct settlement operations within the United States will be assigned a "US" AAIC prefix if approved. Certified accounting authorities, who maintain their settlement operations outside the U.S., will retain the AAIC originally assigned by the country of origin. We do not intend to approve as accounting authorities any foreign-based entities who have not already been approved as accounting authorities by other administrations.

22. Because the primary purpose of our proposed rules is to ensure adherence to international settlement procedures, we are including language in the application and rules which would make clear to applicants the requirement to adhere to applicable FCC policies and rules, the International Telecommunication Regulations (ITR), and other international rules, regulations, agreements, and, where appropriate, CCITT Recommendations. The rules also propose that all applicants provide evidence of financial responsibility. To the extent that the applicant is a business with sound accounting capability, formal financial statements will be required. Individuals may provide other documentation proving all assets, liabilities, income and expenses. We invite comment as to the types of documents acceptable for this purpose as well as the specific criteria for evaluation. Although the United States is not a guarantor of payments by its citizens, our proposed rules seek to minimize potential financial risks that might be present if settlement operations are performed by other accounting authorities and to document FCC policy that the ship station licensee has final responsibility for settlement should their selected accounting authority be unable or unwilling to make valid payments to foreign entities.

23. The rules also detail the procedures the Commission will utilize to obtain any public comment on applications received by the Commission as well as to notify applicants as to whether they have been certified as accounting authorities. Comments received during the informal public comment period, to the extent that we receive information that an applicant could not meet the financial or technical responsibilities of an accounting authority, or, otherwise serve the best interests of the U.S. Government, will be taken into consideration in making a determination as to whether to approve the applicant as an accounting authority.

24. The Commission would examine the applicant's basic qualifications and any comments received during the informal public comment period, and, if the applicant is found to be qualified, the Commission would then inform the applicant, in writing, that the application has been approved.

25. **Settlement Operations.** We set forth in these sections several operational requirements for accounting authorities to follow. Basically, these operational requirements parallel applicable ITR and other international rules, regulations, agreements, and applicable CCITT Recommendations and require adherence to established international procedures.

26. We are proposing to allow accounting authorities a full six months following certification as an accounting authority to commence settlement operations. This appears to us to be a reasonable period of time in which to initiate settlements.

27. The rules also propose a settlement period, or period of time within which individual settlements must be accomplished, consistent with ITU procedures. This provision requires accounting authorities to make timely payment to foreign administrations and to accept accounts both in gold francs and in Special Drawing Rights (SDRs). These requirements are in accord with existing international procedure and FCC policy, as is the requirement to settle accounts taking into consideration CCITT Recommendation D.90.

28. In addition, the proposed rules establish the requirement that accounting authorities cooperate fully with the Commission concerning maritime settlements issues. This requirement is designed to ensure that outstanding accounting settlement issues or financial problems of accounting authorities are resolved effectively, timely and in accordance with established policies and procedures. Since the United States government is required, upon request, to take all possible steps, within the limits of applicable national law, to ensure settlement of the accounts of the licensee, (Radio Regulations, Geneva 1979, Article 66, Section III Accounting, paragraph 10, number 5097) this requirement is intended to ensure that the Commission is kept aware of potential problems or issues which could affect the national interest or which could have a significant impact on overall settlement operations. The proposed rules also make accounting authorities subject to audit by the Commission or its representative.

29. **Reporting Requirements.** We propose several new reporting requirements that would be required of accounting authorities. These reports should enable the Commission to monitor accounting authority operations to ensure adherence to these rules and to appropriate international settlement procedures. Currently, the Commission submits monthly reports to the ITU in Geneva detailing the inventory of U.S. licensed ship stations operating in international waters. We propose that accounting authorities provide the Commission with a detailed report of additions, deletions, or modifications to their inventory of serviced vessels each month. The Commission would use this information to maintain the ITU database and to assure efficient settlement operations. The rules also require an end of year inventory of vessels for which the accounting authority is the settlement entity and an annual statistical report (See Exhibit 2.) which would provide information to the Commission regarding settlement operations.

30. **Enforcement.** These sections of the rules set forth the procedures the Commission will use to investigate and to resolve complaints or infractions of the Commission's rules or established international settlement procedures. The proposed rules specify grounds for enforcement sanctions, including forfeiture, and/or cancellation of an accounting authority's certification. The rules also specify that the Commission will afford an accounting authority notice and an opportunity to present its side of any issue involving cancellation of its accounting authority privilege. The rules also provide that any ship station licensee affected by the cancellation of an accounting authority's privilege must find another accounting authority to settle its accounts. The Commission will notify the ship stations, via a Public Notice, of any cancellations, and, inasmuch as possible, list individual shipowners serviced by the cancelled accounting authority and identified from the required reports of vessel inventories. Finally, the proposed rules provide for forfeiture or other sanction action should a ship operator or licensee not remit full and timely payment to the Commission or to an approved accounting authority when properly billed or in the event that the accounting authority fails in their responsibility to forward payment to the foreign entity. The Commission reserves the right to cooperate with foreign administrations in restricting public correspondence communications to and from vessels for which valid payments have not been received or made as required (Distress and safety communications must be carried without charge.) and to utilize available debt collection procedures to collect amounts owed.

IV. PROCEDURAL MATTERS

31. **Ex Parte.** This is a non-restricted notice and comment rule-making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

32. **The Regulatory Flexibility Act.** As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix 2. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Public L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

33. **Notice and Comment Provision.** Authority for the proposed rules is contained in Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended (47 U.S.C. §§154(i), 154(j) and 303(r)). Pursuant to Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before **February 3, 1994,** and reply comments on or before **February 18, 1994**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the Commission's reliance on such information is noted in the Report and Order.

34. Participants in this proceeding must file an original and four copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Persons who wish to participate informally may submit two copies of their comments, stating thereon the docket number of this proceeding. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at that address. For additional information on this proceeding, please contact Shirley Wood at (202) 632-1027.

V. CONCLUSION

35. The Commission is proposing these rules to establish basic qualifications and requirements for individuals or entities who may wish to serve as accounting authorities for the settlement of international radio maritime accounts involving U.S. registered vessels operating in foreign or international waters. By these rules, the Commission seeks to ensure that accounting authorities operate in accordance with established international procedures. We seek comment on the proposed rules and any alternatives you may have.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX 1

Title 47 of the Code of Federal Regulations is revised to add a new Part 3 as follows:

Part 3 - AUTHORIZATION AND ADMINISTRATION OF ACCOUNTING AUTHORITIES IN MARITIME AND MARITIME MOBILE-SATELLITE RADIO SERVICES

General

Sec.

3.1 Scope, basis, purpose.

3.2 Terms and definitions.

Eligibility

3.10 Basic qualifications.

3.11 Location of settlement operation.

Application Procedures

3.20 Application form.

3.21 Order of consideration.

3.22 Number of accounting authority identification codes per applicant.

3.23 Legal applicant.

3.24 Evidence of financial responsibility.

3.25 Number of copies.

3.26 Where application is to be mailed.

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3.29 Notification of authorization.

Settlement Operations

3.40 Operational requirements.

3.41 Amount of time allowed before initial settlements.

3.42 Location of processing facility.

3.43 Applicable rules and regulations.

3.44 Time to achieve settlements.

3.45 Amount of charges.

3.46 Use of gold francs.

3.47 Use of SDRs.

3.48 Cooperation with the Commission.

3.49 Agreement to be audited.

3.50 Retention of settlement records.

3.51 Cessation of operations.

3.52 Complaint/inquiry resolution procedures.

3.53 FCC notification of refusal to provide telecommunications service to U.S. registered vessel(s).

3.54 Notification of change in address.

Reporting Requirements

3.60 Reports.

3.61 Reporting address.

Enforcement

3.70 Investigations/sanctions.

3.71 Warnings.

3.72 Grounds for further enforcement action.

3.73 Waiting period after cancellation.

3.74 Ship stations affected By suspension, cancellation or relinquishment.

3.75 Licensee's failure to make timely payment.

3.76 Licensee's liability for payment.

General

§ 3.1 Scope, basis, purpose.

By these rules the Federal Communications Commission is delineating its responsibilities in certifying and monitoring accounting authorities in the maritime mobile and maritime mobile-satellite radio services. These entities settle accounts for public correspondence. These rules are intended to ensure that settlements of accounts for U.S. licensed ship radio stations are conducted in accordance with the International Telecommunication Regulations (ITR), taking into account the applicable CCITT Recommendations.

§ 3.2 Terms and definitions.

(a) Accounting Authority. The Administration of the country that has issued the license for a mobile station (or the recognized private operating agency or other entity/entities designated by the Administration in accordance with L1 to L6 of CCITT Recommendation D.90) to whom maritime accounts in respect of mobile stations licensed by that country may be sent.

(b) Accounting Authority Certification Officer. The official designated by the Managing Director, Federal Communications Commission, who is responsible, based on the coordination and review of information related to applicants, for granting certification as an accounting authority in the maritime mobile and maritime mobile-satellite radio services. The Accounting Authority Certification Officer may initiate action to suspend or cancel an accounting authority certification if it is determined to be in the public's best interest.

(c) Accounting Authority Identification Codes (AAICs). The discrete identification code of accounting authority responsible for the settlement of maritime accounts (Annex A to CCITT Recommendation D.90).

(d) Administration. Any governmental department or service responsible for discharging the obligations undertaken in the Convention of the International Telecommunication Union and the Radio Regulations. For purposes of these rules, "Administration" refers to a foreign government or the U.S. Government, and more specifically, to the Federal Communications Commission.

(e) Authorization. Approval by the Federal Communications Commission (FCC) to operate as an accounting authority. Synonymous with "certification".

(f) CCITT.[5] The internationally recognized French acronym for the International Telegraph and Telephone Consultative Committee, one of the sub-entities of the International Telecommunication Union (ITU). The CCITT is responsible for developing international telecommunications recommendations relating to standardization of international telecommunications services and facilities, including matters related to international charging and ac-

[5] At the ITU Additional Plenipotentiary Conference in Geneva (December 1992), the structure, working methods, and construct of the basic ITU treaty instrument were modified. The result of this is that the names of the sub-entities of the ITU will change (e.g., the CCITT will become the Telecommunication Standardization Sector and Recognized Private Operating Agency will become Recognized Operating Agency). The changes were placed into provisional effect on March 1, 1993; however, since the formal entry into 0* force of these changes is not until July 1, 1994, we will refer to the familiar, existing ITU nomenclatures and documents for convenience and ease of understanding in this instant proceeding.

counting principles and the settlement of international telecommunications accounts. Such recommendations are, effectively, the detailed implementation provisions for topics addressed in the International Telecommunication Regulations (ITR).

(g) Certification. Approval by the Federal Communications Commission (FCC) to operate as an accounting authority. Synonymous with "authorization".

(h) Coast Earth Station. An earth station in the fixed-satellite service or, in some cases, in the maritime mobile-satellite service, located at a specified fixed point on land to provide a feeder link for the maritime mobile-satellite service.

(i) Coast Station. A land station in the maritime mobile service.

(j) Commission. The Federal Communications Commission. The FCC.

(k) Gold Franc. A monetary unit representing the value of a particular nation's currency to a gold par value. One of the monetary units used to effect accounting settlements in the maritime mobile and the maritime mobile-satellite services.

(l) International Telecommunication Union (ITU). One of the United Nations family organizations headquartered in Geneva, Switzerland along with several other United Nations (UN) family organizations. The ITU is the UN agency responsible for all matters related to international telecommunications. The ITU has over 170 Member Countries, including the United States, and provides an international forum for dealing with all aspects of international telecommunications, including radio, telecom services and telecom facilities.

(m) Linking Coefficient. The ITU mandated conversion factor used to convert gold francs to Special Drawing Rights (SDRs). Among other things, it is used to perform accounting settlements in the maritime mobile and the maritime mobile-satellite services.

(n) Maritime Mobile Service. A mobile service between coast stations and ship stations, or between ship stations, or between associated on-board communication stations. Survival craft stations and emergency position-indicating radiobeacon stations may also participate in this service.

(o) Maritime Mobile-Satellite Service. A mobile-satellite service in which mobile earth stations are located on board ships. Survival craft stations and emergency position-indicating radiobeacon stations may also participate in this radio service.

(p) Public Correspondence. Any telecommunication which the offices and stations must, by reason of their being at the disposal of the public, accept for transmission. This usually applies to maritime mobile and maritime mobile-satellite stations.

(q) Recognized Private Operating Agencies (RPOAs).[6] Individuals, companies or corporations, other than governments or agencies, recognized by administrations, which operate telecommunications installations or provide telecommunications services intended for international use or which are capable of causing interference to international telecommunications. RPOAs which settle debtor accounts for public correspondence in the maritime mobile and maritime mobile-satellite radio services must be certified as accounting authorities.

(r) Ship Station. A mobile station in the maritime mobile service located on board a vessel which is not permanently moored, other than a survival craft station.

(s) Special Drawing Right (SDR). A monetary unit of the International Monetary Fund (IMF) currently based on a market basket of exchange rates for the United States, West Germany, Great Britain, France and Japan but is subject to IMF's definition. One of the monetary units used to effect accounting settlements in the maritime mobile and maritime mobile-satellite services.

(t) United States. The continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

Eligibility

§ 3.10 Basic qualifications.

(a) Applicants must meet the requirements and conditions contained in these rules in order to be certified as an accounting authority. No individual or other entity, including accounting authorities approved by other administrations, may act as a United States accounting authority and settle accounts of U.S. licensed vessels in the maritime mobile or maritime mobile-satellite services without a certification from the Federal Communications Commission.

(b) U.S. citizenship is not required of individuals in order to receive certification from the Commission to be an accounting authority. Likewise, joint ventures need not be organized under the laws of the United States in order to be eligible to perform settlements for U.S. licensed vessels. See, however, Section 3.11.

(c) Prior experience in maritime accounting, general commercial accounting, international shipping or any other related endeavor will be taken into consideration by the Commission in certifying accounting authorities. The lack of such expertise, however, will not automatically disqualify an individual, partnership, corporation or other entity from becoming an accounting authority.

(d) Applicants must provide formal financial statements or documentation proving all assets, liabilities, income and expenses.

§ 3.11 Location of settlement operation.

(a) Within the United States. Certified accounting authorities maintaining all settlement operations, as well as associated documentation, within the United States will be assigned Accounting Authority Identification Codes with a "US" prefix.

(b) Outside the United States. Certified accounting authorities maintaining settlement operations outside the United States will be assigned the same Accounting Authority Identification Codes as those originally assigned to such entities by the administrations of the countries of origin. However, in no case will an entity be certified as an accounting authority for settlement of U.S. licensed vessel accounts unless the entity is requesting to conduct a settlement operation in the United States or has already been issued an AAIC by another administration.

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[6] See Footnote, p. 13.

Application Procedures

§ 3.20 Application form.

Written application must be made to the Federal Communications Commission on FCC Form 44, "Application For Certification As An Accounting Authority" in order to be considered for certification as an accounting authority. No other application form may be used. No consideration will be given to applicants not submitting applications in accordance with these rules or in accordance with any other instructions the Commission may issue. FCC Form 44 may be obtained from the Commission by writing to the address shown in Section 3.61.

§ 3.21 Order of consideration.

(a) Accounting Authority applications will be processed on a first-come first-served basis. When applications are received on the same day, the application with the earliest mailing date, as evidenced by the postmark, will be processed first.

(b) At any given time, there will be no more than 25 certified accounting authorities with a minimum of 15 "US" Accounting Authority Identification Codes (AAICs) reserved for use by accounting authorities conducting settlement operations within the United States. The Commission will retain all valid applications received after the maximum number of accounting authorities have been approved and will inform such applicants that should an Accounting Authority Identification Code become available for reassignment in the future, the Commission will conditionally certify as an accounting authority the oldest of the qualified pending applicants, as determined by the order of receipt. Final certification would be conditional upon filing of an amended application (if neccessary). The Commission will inform the applicant of his/her conditional selection in writing to confirm the applicant's continued interest in becoming an accounting authority.

§ 3.22 Number of accounting authority identification codes per applicant.

(a) No entity will be entitled to or assigned more than one Accounting Authority Identification Code (AAIC).

(b) Accounting Authority Identification Codes may not be reassigned, sold, bartered or transferred and do not convey upon sale or absorption of a company or firm without the express written approval of the Commission. Only the FCC may certify accounting authorities and assign U.S. Accounting Authority Identification Codes for entities settling accounts of U.S. licensed vessels in the maritime mobile and maritime mobile-satellite services.

§ 3.23 Legal applicant.

The application shall be signed by the individual, partner or primary officer of a corporation who is legally able to obligate the entity for which he or she is a representative.

§ 3.24 Evidence of financial responsibility.

All applicants must provide evidence of sound financial status. To the extent that the applicant is a business, formal financial statements will be required. Other applicants may submit documentation proving all assets, liabilities, income and expenses which supports their ability to meet their personal obligations.

§ 3.25 Number of copies.

One original and two copies of FCC Form 44, "Application For Certification As An Accounting Authority" will be required. Only applications mailed to the Commission on official, Commission approved application forms will be considered. Applications should be mailed at least 90 days prior to planned commencement of settlement activities to allow time for the Commission to review the application and to allow for the informal public comment period.

§ 3.26 Where application is to be mailed.

All applications shall be mailed to the Accounting Authority Certification Officer in Washington, D.C. The designated address will be displayed on the FCC Form 44, "Application for Certification As An Accounting Authority".

§ 3.27 Amended application.

Changes in circumstances of a material nature that cause information previously supplied to the FCC to be incorrect or incomplete and that could affect the approval process, require the submission of an amended application. The amended application should be mailed to the Commission immediately following such material change. See also Sections 3.24 and 3.51.

§ 3.28 Denial of privilege.

The Commission, in its sole discretion, may refuse to grant an application to become an accounting authority for any of the following reasons:

(a) Failure to provide evidence of acceptable financial responsibility.

(b) If the applicant, in the opinion of the FCC reviewing official, does not possess the qualifications necessary to the proper functioning of an accounting authority.

(c) Application is not personally signed by the proper official(s).

(d) Applicant does not provide evidence that accounting operations will take place in the United States or its territories and the applicant does not already possess an AAIC issued by another administration.

(e) Application is incomplete, the applicant fails to provide additional information requested by the Commission or the applicant indicates that it cannot meet a particular provision.

(f) When the Commission determines that the grant of an authorization is contrary to the public interest.

§ 3.29 Notification of authorization.

(a) The Commission will publish the name of an applicant in a Public Notice before granting certification and will invite informal public comment on the qualifications of the applicant from any interested parties. Comments received will be taken into consideration by the Commission in making its determination as to whether to approve an applicant as an accounting authority.

(b) The Commission will notify each applicant in writing as to whether the applicant has been approved as an accounting authority. If the application is not approved, the Commission will provide a brief statement of the grounds for denial.

(c) The names and addresses of all newly certified accounting authorities will be published in a Public Notice issued by the Commission. Additionally, the Commission will notify the ITU within 30 days of any changes to its approved list of accounting authorities.

Settlement Operations

§ 3.40 Operational requirements.

All accounting authorities must conduct their operations in conformance with the provisions contained in this section and with relevant rules and guidance issued from time to time by the Commission.

§ 3.41 Amount of time allowed before initial settlements.

An accounting authority must begin settling accounts no later than six months from the date of certification. Failure to commence settlement operations is cause for suspension or cancellation of an accounting authority certification.

§ 3.42 Location of processing facility.

Settlement of maritime mobile and maritime mobile-satellite service accounts must be performed within the United States by all accounting authorities possessing the "US" prefix. Other accounting authorities approved by the Commission may settle accounts either in the U.S. or elsewhere. See also Sections 3.11 and 3.21(b).

§ 3.43 Applicable rules and regulations.

Accounting authority operations must be conducted in accordance with applicable FCC rules and regulations, the International Telecommunication Regulations (ITR), and other international rules, regulations, agreements, and, where appropriate, CCITT Recommendations. In particular, the following must be adhered to (or taken into account in the case of CCITT Recommendations):

(a) The latest basic treaty instrument(s) of the International Telecommunication Union (ITU) which have been ratified by the United States - currently the ITU Convention (Nairobi, 1982);

(b) Binding agreements contained in the Final Acts of World Administrative Radio Conferences and/or World International Telecommunication Conferences;

(c) ITU Radio Regulations;

(d) ITU International Telecommunication Regulations (ITR);

(e) CCITT Recommendations (particularly D.90 and D.195); and

(f) FCC Rules and Regulations.

§ 3.44 Time to achieve settlements.

All maritime telecommunications accounts should be timely paid in accordance with applicable ITU Regulations, Article 66 and International Telecommunication Regulations (Melbourne, 1988). Accounting authorities are deemed to be responsible for remitting, in a timely manner, all valid amounts due to foreign administrations or their agents.

§ 3.45 Amount of charges.

Accounting Authorities may charge any reasonable fee for their settlement services. Settlements themselves, however, must adhere to the standards set forth in these rules and must be in accordance with the International Telecommunication Regulations (ITR) taking into account the applicable CCITT Recommendations and other guidance issued by the Commission.

§ 3.46 Use of gold francs.

An accounting authority must accept accounts presented to it from foreign administrations in gold francs. These gold francs must be converted on the date of receipt of the bill to the applicable Special Drawing Right (SDR) rate (as published by the International Monetary Fund) on that date utilizing the linking coefficient of 3.061 gold francs = 1 SDR. An equivalent amount in U.S. dollars must be paid to the foreign administration. Upon written concurrence by the FCC, an accounting authority may make separate agreements, in writing, with foreign administrations or their agents for alternative settlement methods, in accordance with CCITT Recommendation D.195.

§ 3.47 Use of SDRs.

An accounting authority must accept accounts presented to it from foreign administrations in Special Drawing Rights (SDRs). These SDRs must be converted to dollars on the date of receipt by the accounting authority and an equivalent amount in US dollars must be paid to the foreign administration. The conversion rate will be the applicable rate published by the International Monetary Fund (IMF) for the date of receipt of the account from the foreign administration. Upon written concurrence by the FCC, any accounting authority may make separate agreements, in writing, with foreign administrations or their agents for alternative settlement methods, provided account is taken of CCITT Recommendation D.195.

§ 3.48 Cooperation with the Commission.

Accounting authorities must cooperate fully with the FCC in all respects concerning international maritime settlements issues, including the resolution of questions of fact or other issues arising as a result of settlement operations.

§ 3.49 Agreement to be audited.

Accounting authorities accept their certifications on condition that they are subject to audit by the Commission or its representative at any time. Additionally, the Commission reserves the right to verify any statement(s) made or any materials submitted to the Commission under these rules. Verification may involve discussions with ship owners or others as well as the requirement to submit additional information to the Commission. Failure to respond satisfactorily to any audit findings is grounds for forfeiture or suspension or cancellation of authority to act as an accounting authority for U.S. vessels.

§ 3.50 Retention of settlement records.

Accounting authorities must maintain, for the purpose of compliance with these rules, all settlement records for a period of at least seven years following settlement of an account with a foreign administration or agent.

§ 3.51 Cessation of operations.

The FCC must be notified immediately should an accounting authority plan to relinquish its certification or cease to perform settlements as authorized. Additionally, the Commission must be advised in advance of any pro-

posed transfer of control of an accounting authority's firm or organization, by any means, to another entity. Any transfer of control of an accounting authority firm or organization to another entity cancels the previous accounting authority certification. The new entity must apply for certification in its own right if it is interested in becoming an accounting authority.

§ 3.52 Complaint/inquiry resolution procedures.

(a) Accounting authorities must maintain procedures for resolving complaints and/or inquiries from its contractual customers (vessels for which it performs settlements), the FCC, the ITU, and foreign administrations or their agents.

(b) If a foreign administration requests assistance in collection of accounts from ships licensed by the FCC, the appropriate accounting authority will provide all information requested by the Commission in a timely manner to enable the Commission to determine the cause of the complaint and to resolve the issue. If accounts are in dispute, the Commission will determine the amount due the foreign administration, accounting authority or RPOA, and may direct the accounting authority to pay the accounts to the foreign administration. If the accounting authority does not pay the disputed accounts within a reasonable timeframe, the Commission may take action to levy a forfeiture, cancel the AAIC privilege and/or to revoke any operating authority or licenses held by that accounting authority. (See also Section 3.72).

§ 3.53 FCC notification of refusal to provide telecommunications service to U.S. registered vessel(s).

An accounting authority must inform the FCC immediately should it receive notice from any source that a foreign administration or facility is refusing or plans to refuse legitimate public correspondence to or from any U.S. registered vessel.

§ 3.54 Notification of change in address.

The Commission must be notified in writing within 15 days of any change in address of an accounting authority. Such written notification should be sent to the address shown in Section 3.61.

Reporting Requirements

§ 3.60 Reports.

(a) Inventory of Vessels. Within 60 days after receiving final approval from the FCC to be an accounting authority, each certified accounting authority must provide to the FCC an initial list of vessels for which it is performing settlements. This list should contain only U.S. registered vessels. Such list shall be typewritten or computer generated, be annotated to indicate it is the initial inventory and be in the general format of the following and provide the information shown:

Vessel Name	Call Sign	Country of Registry

(b) Monthly Report on Additions/Modifications/Deletions to Vessel Inventory. Beginning 30 days after submission of an accounting authority's Initial Inventory of Vessels (See paragraph (a) of this section) and each month thereafter, each accounting authority is required to submit to the FCC a monthly report on additions, modifications or deletions to its list of vessels for which it is performing or intending to perform settlements, whether or not settlements actually have taken place. The list should contain only U.S. registered vessels. The report shall be typewritten or computer generated and be in the following general format:

ADDITIONS TO CURRENT VESSEL INVENTORY

Vessel Name	Call Sign	Effective Date

MODIFICATIONS TO CURRENT VESSEL INVENTORY

Previous Vessel Name	Previous Call Sign	New Vessel Name	New Call Sign	Effective Date

DELETIONS TO CURRENT VESSEL INVENTORY

Vessel Name	Call Sign	Effective Date

The preceeding report must be received by the Commission no later than 15 days following the end of the month for which the report pertains. Modifications refer to changes to call sign or ship name of vessels for which the accounting authority settles accounts and for which basic information has previously been provided to the Commission. Reports are to be submitted even if there have been no additions, modifications or deletions to vessel inventories since the previous report. If there are no changes to an inventory, this should be indicated on the report.

(c) End of Year Inventory. By February 1st of each year, each accounting authority will submit an end-of-year inventory report listing vessels for which the accounting authority performs settlements as of the previous December 31st. The list should contain only U.S. registered vessels. The report must be typewritten or computer generated and prepared in the same general format as that shown in paragraph (a) of this section except it should be annotated to indicate it is the End of Year inventory.

(d) Annual Statistical Report of Settlement Operations. By February 1st of each year, each accounting authority settling accounts for U.S. registered vessels must prepare and submit to the FCC an Annual Statistical Report, FCC Form 45, which details the number and dollar amount of settlements, by foreign administration, during the preceding twelve months. Information contained in this report provides statistical data for Commission use.

§ 3.61 Reporting address.

All reports must be received at the following address no later than the required reporting date:

Accounting Authority Certification Officer
Financial Management Division, Stop 1110A
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Enforcement

§ 3.70 Investigations/sanctions.

The Commission may investigate any complaints made against accounting authorities to ensure compliance with the Commission's rules and with applicable ITU Regulations and other international maritime accounting procedures.

§ 3.71 Warnings.

The Commission may issue written warnings or forfeitures to accounting authorities which are found not to be operating in accordance with established rules and regulations. Warnings will generally be issued for violations which do not seriously or immediately affect settlement functions or international relations. Continued or unresolved violations may lead to further enforcement action by the Commission, including any or all legally available sanctions, including but not limited to, forfeitures (Communications Act of 1934, Sec. 503), suspension or cancellation of the accounting authority certification.

§ 3.72 Grounds for further enforcement action.

(a) The Commission may take further enforcement action, including forfeiture, suspension or cancellation of an accounting authority certification, if it is determined that the public interest so requires. Reasons for which such action may be taken include, inter alia:

(1) Failure to initiate settlements within six months of certification or failure to perform settlements during any subsequent six month period;

(2) Illegal activity or fraud;

(3) Non-payment or late payment to a foreign administration or agent;

(4) Failure to follow ITR requirements and procedures;

(5) Failure to take into account CCITT Recommendations;

(6) Failure to follow FCC rules and regulations;

(7) Bankruptcy; 0*

(8) Providing false or incomplete information to the Commission or failure to comply with or respond to requests for information.

(b) Prior to taking any of the enforcement actions in paragraph (a) of this section, the Commission will give notice of its intent to take the specified action and the grounds therefor, and afford an opportunity to respond in writing; provided that, where the public interest so requires, the Commission may temporarily suspend a certification pending completion of these procedures.

§ 3.73 Waiting period after cancellation.

An accounting authority whose certification has been cancelled must wait a minimum of three years before reapplying to be an accounting authority.

§ 3.74 Ship stations affected by suspension, cancellation or relinquishment.

(a) Whenever the accounting authority privilege has been suspended, cancelled or relinquished, the accounting authority is responsible for immediately notifying all U.S. ship licensees for which it was performing settlements of the circumstances and informing them of the requirement contained in paragraph (b) of this section.

(b) Those ship stations utilizing an accounting authority's AAIC for which the subject accounting authority certification has been suspended, cancelled or relinquished, must make contractual arrangements with another properly authorized accounting authority to settle its accounts.

(c) The Commission will notify the ITU of all accounting authority suspensions, cancellations and relinquishments, and

(d) The Commission will publish a Public Notice detailing all accounting authority suspensions, cancellations and relinquishments.

§ 3.75 Licensee's failure to make timely payment.

Failure to remit proper and timely payment to the Commission or to an accounting authority may result in one or more of the following actions against the licensee:

(a) Forfeiture or other authorized sanction.

(b) The refusal by foreign countries to accept or refer public correspondence communications to or from the vessel or vessels owned, operated or licensed by the person or entity failing to make payment. This action may be taken at the request of the Commission or independently by the foreign country or coast station involved.

(c) Further action to recover amounts owed utilizing any or all legally available debt collection procedures.

§ 3.76 Licensee's liability for payment.

The U.S. ship station licensee bears ultimate responsibility for final payment 0* of its accounts. This responsibility cannot be superseded by the contractual agreement between the ship station licensee and the accounting authority. In the event that an accounting authority does not remit proper and timely payments on behalf of the ship station licensee:

(a) The ship station licensee will make arrangements for another accounting authority to perform future settlements, and

(b) The ship station licensee will settle any outstanding accounts due to foreign entities.

The Commission will, upon request, take all possible steps, within the limits of applicable national law, to ensure settlement of the accounts of the ship station licensee. As circumstances warrant, this may include issuing warnings to ship station licensees when it becomes apparent that an accounting authority is failing to settle accounts. See also Sections 3.70- 3.74.

APPENDIX 2

Initial Regulatory Flexibility Analysis

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding the administration of Accounting Authorities in the maritime mobile and maritime mobile-satellite radio services except for distress and safety communications.

Objectives

The Commission seeks to establish standards for the approval and/or cancellation of Accounting Authority certification to be administered by the Commission.

Legal Basis

The proposed action is authorized under sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended.

Reporting, Recordkeeping and Other Compliance Requirements

Entities or individuals who wish to become accounting authorities or who have been issued interim accounting authority certifications would need to file an application with the Commission and present assurance of financial responsibility. Accounting authorities would be required to report to the Commission on the status of their settlement activities.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Any rule changes in this proceeding could affect small businesses wishing to become accounting authorities. The number of small entities that will be affected is unknown. The Commission will further examine the impact of any rule changes on small entities after evaluating the comments in this proceeding.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR CERTIFICATION AS AN ACCOUNTING AUTHORITY

Approved by OMB
3060-
Approval Expires
See page 3 for information regarding public burden estimate.

(FCC USE ONLY)

Approved: Yes ☐ Assigned AAIC [_ _ _ _]
No ☐ Reason for Denial Attached

INSTRUCTIONS: This application is to be used to apply to become an Accounting Authority in accordance with Part 3 of the Commission's rules. Complete all items and mail the original and two copies of your application, together with a copy of any applicable Articles of Incorporation and/or Bylaws, to the following address:

ACCOUNTING AUTHORITY CERTIFICATION OFFICER
FINANCIAL MANAGEMENT DIVISION, STOP 1110A
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Please allow up to six weeks to process your application. (NO FEE REQUIRED)
Failure to respond to all items may result in your application being returned without action. Please review the application carefully and ensure that the application is signed by the appropriate official(s) and that all required information is provided.

Name of Applicant - Individual: *(Last, First, MI)*

Names of Applicants - (Partnership):

Name of Applicant - (Corporation):

Are your currently an Accounting Authority? ..... ☐ Yes ☐ No

If yes, show your current AAIC here: [_ _ _ _]

BUSINESS ADDRESS:	ADDRESS WHERE SETTLEMENTS WILL ACTUALLY BE PROCESSED:
STREET ADDRESS:	STREET ADDRESS:
CITY:	CITY:
STATE: ZIP CODE:	STATE: ZIP CODE:
COUNTRY:	COUNTRY:
NORMAL BUSINESS HOURS:	TELEPHONE NUMBER (include area code):

APPLICANT ANTI-DRUG CERTIFICATION: By checking "YES", the applicant certifies that, in the case of an individual applicant, he or she is not subject to denial of federal benefits, that includes FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. 862, or, in the case of a non-individual applicant (e.g., corporation, partnership, or other unincorporated association), no party to the applicant is subject to a denial of federal benefits, that includes FCC benefits, pursuant to that section. For the definition of "party" for these purposes, see 47 CFR 1.2002(b). ..... ☐ Yes ☐ No

Willful false statements made on this form can be cause for denial, suspension or cancellation of Accounting Authority Certification and are punishable by fine and/or imprisonment. U.S. Code, Title 18, Section 1001), AND/OR REVOCATION OF STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).

FCC Form 44

Qualifications: *(Use additional sheets if necessary):*

Detail any prior relevant qualifying experience as well as how you plan to conduct settlements. Your statement should provide sufficient information for the Commission to determine if you are qualified to perform settlements.

Will you be settling accounts for U.S. licensed vessels? Yes ☐ No ☐

Structure of Company or Corporation *(Use additional sheets if necessary):*

Please provide a brief summary describing the structure of your settlement operation as it relates to your overall company or corporate structure. Provide a copy of your Articles of Incorporation and/or Bylaws.

PROJECTED STAFFING:
(Settlement Function Only)

Number of Full-Time Employees: _____

Number of Part-Time Employees: _____

FCC Form 44 - Page 2

Evidence of Financial Responsibility

All applicants who intend to settle accounts for U.S. licensed ship stations must provide evidence of their financial responsibility. Data to support your claim may consist of a formal financial statement or other documentation that proves all assets, liabilities, income and expenses.

Type of evidence provided:

Projected Dollar Amount of Settlements to be Paid to Foreign Administrations on Behalf of U.S. Licensed Vessels During the Remainder of the Current Calendar Year: $

By virtue of my signature below, I hereby make application of the Federal Communications Commission to become an Accounting Authority. I have responded to all items on this application honestly and completely. I understand that should I be approved to be an Accounting Authority, I must adhere to all applicable FCC policies and rules, the International Telecommunications Regulations (ITR), and other rules, regulations, agreements, and where applicable, CCITT Recommendations, (47 CFR Section 3.43 of the Commission rules). I also acknowledge that I will submit to the FCC all required information reports in a timely manner and that I will meet all financial responsibility requirements. I agree to cooperate with the FCC on any matter and agree to be audited when deemed appropriate by the FCC. I further acknowledge that I may not trade, reassign, sell or otherwise transfer my authority to act as an Accounting Authority without the express approval of the FCC and that I may not be assigned more than one Accounting Authority Identification Code. I agree to maintain my processing operation within the United States unless I am an existing foreign Accounting Authority applying to settle accounts of U.S. licensed vessels. Should I cease to function as an Accounting Authority, I agree to notify the FCC immediately. I agree to maintain acceptable complaint resolution procedures and to notify the FCC immediately should I receive notice of any refusal of a foreign administration/facility to handle legitimate telecommunications between U.S. licensed vessels and the foreign entity.

I acknowledge that I am familiar with FCC Rule Part 3 concerning sanctions and grounds for forfeiture or suspension or cancellation of an Accounting Authority's certification.

Signed and Dated this Day: _____ ***Date:*** _____

_____ ***Date:*** _____

_____ ***Date:*** _____

FCC NOTICE FOR INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

Part 3 of the Commission's Rules authorized the FCC to request the information on this application. The purpose of the information is to determine your eligibility for certification as an Accounting Authority. The information will be used by FCC staff to evaluate the application, to provide information for enforcement and rulemaking proceedings and to maintain a current inventory of Accounting Authorities. No authorization can be granted unless all information requested is provided. Failure to provide all requested information will delay the processing of the application or result in the application being returned without action. Information requested by this form will be available to the public. Your response is required to obtain the requested authorization.

Public reporting burden for this collection of information is estimated to average three hours per response, including the time for reviewing instructions, searching data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Federal Communications Commission, Records Management Division, AMD-PIRS, Washington, DC 20554, and to the Office of Management and Budget, Paperwork Reduction Project (3060- ___), Washington, DC 20503.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3) AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

Information requested on; or, in connection with this form will be available for inspection by the public.

NOTE: In addition to the information required by this form, the Commission will request any additional information which may be necessary for consideration of this application.

FEDERAL COMMUNICATIONS COMMISSION

Approved by OMB
3060-
Approval Expires
See page 2 for information regarding public burden estimate.

ANNUAL STATISTICAL REPORT OF SETTLEMENT OPERATIONS

FOR CALENDAR YEAR ENDING: _____ AAIC: _ _ _ _

INSTRUCTIONS: Each Accounting Authority must submit this report by February 1st following the end of the previous calendar year. Complete each item and sign the report where indicated. Show by country the number and amount of settlements processed during the preceeding calendar year for U.S. registered vessels only. Do not show foreign registered or licensed vessels. The number of settlements is defined as the number of actual line items billed by the foreign administration or agent. The dollar amount of settlements should be associated with the line item totals. Reports should be typewritten and mailed to the following address:

Accounting Authority Certification Officer
Financial Management Division, STOP 1110A
Federal Communications Commission
Washington, D.C. 20554

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(1) Number of individual vessels (of U.S. registry) for which you performed at least one settlement action during the preceeding calendar year: . . . . . _____

(2) Average number of unprocessed settlements on hand (as of December 31): . . . _____

(3) Number of settlements processed to completion more than 180 days after dispatch from foreign administration or agent: . . . . . _____

(4) Percent of settlements processed to completion more than 180 days after dispatch from foreign administration or agent: . . . . . _____ %

(5) Projected number of settlements for current calendar year: . . . . . _____

(6) Projected amount of settlements for current calendar year: . . . . . $ _____

Comments/Problems:

SIGNATURE OF PREPARER:	TITLE:	DATE:

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, Section 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).

FCC Form 45

ANNUAL STATISTICAL REPORT OF SETTLEMENT OPERATIONS

AAIC: - - - -

In the columns below, list by foreign administration the number and amount of settlements processed for U.S. licensed vessels only during the previous calendar year. If the report period covers less than a full calendar year, please indicate the applicable report period here: _____

(1) Name of Foreign Administration	(2) Number of Foreign Settlements Received and Processed Through To Final Settlement	(3) Dollar Amount Actually Paid To Foreign Adminstration

Show Total Amount Paid to Foreign Administrations Here ..... ▶ $ _____

APPLICANT ANTI-DRUG CERTIFICATION: By checking "YES", the applicant certifies that, in the case of an individual applicant, he or she is not subject to denial of federal benefits, that includes FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. 862, or, in the case of a non-individual applicant (e.g., corporation, partnership, or other unincorporated association), no party to the applicant is subject to a denial of federal benefits, that includes FCC benefits, pursuant to that section. For the definition of "party" for these purposes, see 47 CFR 1.2002(b). ..... ☐ Yes ☐ No

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

Part 3 of the Commission's rules authorize the FCC to request the information on this report. The purpose of the information is to provide statistical information to the Commission for overall program monitoring purposes. Failure to provide all the requested information may be grounds for forfeiture, suspension or cancellation of your Accounting Authority privilege. Your response is required to obtain the requested authority.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Audio Communications, Inc.
Petition for a Declaratory Ruling
that the 900 Service Guidelines of
US Sprint Communications Co.
Violate Sections 201(a) and 202(a)
of the Communications Act

MEMORANDUM OPINION AND ORDER

Adopted: November 24, 1993; Released: December 20, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a petition for declaratory ruling, Audio Communications, Inc. (ACI) asks the Commission to hold that US Telecom, acting through its subsidiary, Sprint Telemedia, is in violation of Sections 201(a) and 202(a) of the Communications Act.[1] ACI charges that Sprint Telemedia is violating the Act and federal policy by refusing to provide billing and collection in conjunction with its 900 transmission service to most information providers (IPs) who offer 900 services while Sprint Telemedia continues to offer billing and collection to a limited category of customers. ACI also asserts that, absent Title II jurisdiction, we should take remedial action pursuant to Title I of the Act. We deny ACI's petition because we find that Sprint Telemedia's 900 billing and collection service is not a common carrier offering and that there is no reason to assert Title I jurisdiction over Sprint Telemedia with respect to its provision of billing and collection in conjunction with its 900 transmission service under the present circumstances.

II. BACKGROUND

2. The 900 service industry provides consumers with nationwide access to a wide variety of information services, with American consumers spending approximately $1 billion per year in a market of almost 70,000 "pay-per-call" programs.[2] The provision of 900 service generally entails three or four functions. The production of messages is handled by the IP. When the messages are not live, they are generally stored in audiotex equipment either by IPs themselves or by service bureaus employed by the IPs. Transmission of the messages to callers is handled by interexchange carriers (IXCs) and local exchange carriers (LECs). Finally, there is billing and collection.

3. ACI states that it is one of the largest 900 information service bureaus in the United States. As such, ACI negotiates with IXCs to obtain cost-effective transmission and billing and collection for information services.[3] ACI states that prior to the current controversy, the agreements it negotiated with IXCs for transmission service stated that IXCs would arrange for billing and collection for 900 calls.[4] Generally IXCs made these arrangements with LECs.

4. Sprint Telemedia, an interexchange carrier, entered the 900 services market in 1989 offering both 900 transmission service and a "premium" 900 service that included 900 transmission as well as billing and collection of the IP's charges to the end user. This billing and collection was provided, for the most part, through the LECs.[5] Soon after it entered the 900 market, Sprint Telemedia received complaints from consumers about some of the IP 900 services for which it billed. The complaints concerned the level of IP charges, inadequate or misleading notice about the charges, and allegations that the IP failed to provide the promised goods or information. Sprint Telemedia responded by issuing a set of guidelines for IPs using its 900 billing and collection services.[6]

5. Despite continued efforts to revise its guidelines to stem consumer dissatisfaction with many types of 900 information programs, Sprint Telemedia was unable to do so to its satisfaction. Therefore, on July 1, 1991, Sprint Telemedia announced that it would no longer provide billing and collection for certain "new" 900 transmission service customers, including those that offered personal ads, romance lines, job listings, or credit cards. When this did not sufficiently reduce complaints, Sprint Telemedia went further. On September 24, 1991, it expanded the list of services for which it would not bill to include game and horoscope lines. Furthermore, it stated that it would no longer bill and collect for existing romance lines, credit card lines, and job lines, among others.[7]

6. Sprint Telemedia states that it took this drastic action "backing away from better than 90 percent of the current marketplace."[8] because, "despite its rigorous guidelines, it could not ensure that IPs provided valuable, useful programs to the public."[9] Sprint Telemedia stated that it would "continue to serve certain providers of quality programs such as news, stock quotes, sports information, and weather. Such providers include government agencies and a select group of large companies and associations for which 900 services are minor or additional channels for promotions or revenues."[10] Sprint Telemedia continues to offer 900 transmission service on a common carrier basis, but without billing and collection for all interested IPs.

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[1] ACI, Petition for Declaratory Ruling, Jan. 10, 1992, at 1. Parties filing comments or reply comments are listed in Appendix A.
[2] National Consumers League and Consumer Action (NCL/CA) Comments at 6.
[3] ACI Comments at 2.
[4] *Id.* at 4.
[5] Sprint Telemedia Comments at 2-3.
[6] *Id.* at 3.
[7] *Id.* at 3-4.
[8] ACI Pet. at 9 & Attachment A.
[9] Sprint Telemedia Comments at 4.
[10] *Id.*

III. ISSUES

7. Petitioners argue that Sprint Telemedia's refusal to provide 900 billing and collection service for all 900 services violates both Title II and Title I of the Communications Act. We begin by determining whether the billing and collection service at issue is a common carrier communications service subject to Title II regulations. We conclude that it is not. Title I grants the Commission certain jurisdiction over communications services not specifically within the scope of Title II of the Act.[11] so we next address whether the Commission should exercise Title I jurisdiction in this case. We conclude that it should not.

A. Does the Commission Have Title II Jurisdiction?

8. Title II of the Communications Act grants the Commission jurisdiction over the provision of interstate or foreign common carrier communications services. We now consider whether the 900 billing and collection service provided by Sprint Telemedia is a common carrier communications service subject to our Title II jurisdiction.

1. Is the Billing and Collection Element of Premium 900 Service a Communications Service?

9. *Comments.* All parties view the Commission's 1986 *Detariffing Order* as the leading case on the issue of FCC jurisdiction over billing and collection service. ACI interprets that decision as holding that LEC billing and collection service for IXCs is beyond the scope of Title II because the service is not "incidental" to other related LEC services, and thus not a communications service. ACI argues that the *Detariffing Order* only applies to such stand alone services that are not "incidental" to Title II communications.[12] It states that the billing and collection service at issue here is clearly distinguishable from the service in the *Detariffing Order* because the current billing and collection service is essential to, and therefore incidental to, the underlying Title II transport portion of Premium 900 service.[13] Therefore, ACI concludes that, under the *Detariffing Order*, the billing and collection service at issue here is not beyond Title II jurisdiction.

10. Sprint Telemedia argues that, if anything, IXCs are less related to the IP offerings they bill for than LECs are to the IXC services they bill for. Thus Sprint Telemedia argues that the billing and collection at issue is further beyond the Commission's Title II jurisdiction than that at issue in the *Detariffing Order*. Sprint Telemedia asserts that in the latter case, the LECs are providing billing and collection for Title II services rendered by their access customers, while in the case of 900 service, the services provided by IPs are not Title II services. Sprint Telemedia argues that if the LEC billing and collection for a common carrier service is not a Title II service, then IXC billing and collection for a non-common carrier IP is even less a Title II service.[14]

11. *Discussion.* In *Joint Use Calling Cards*, the Commission stated that LEC billing for unaffiliated IXC services is incidental to the transmission of wire communications and thus is properly considered a communications service under Section 3(a) of the Communications Act.[15] but found that "[b]illing and collection, of course, remains outside the scope of Title II because it is not a common carrier service."[16] The connection between the billing and collection here and the IXC 900 transmission service appears more remote than that involved in LEC billing for IXC services. For purposes of this discussion, however, we will assume that the billing and collection service at issue is incidental to 900 transmission service, and therefore is a communications service under the Communications Act. This, however, does not determine that the service is within the Commission's Title II jurisdiction.[17]

2. Is the Billing and Collection Element of Premium 900 Service a Common Carrier Service?

12. *Background.* Assuming that the billing and collection service at issue here is a communications service, the applicability of Title II of the Communications Act depends on whether it is being offered as a common carrier service.[18] The Commission has clearly established that a single firm that is a common carrier in some roles need

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[11] Detariffing of Billing and Collection Services, 102 FCC 2d 1150, 1169, *recon. denied*, 1 FCC Rcd 445 (1986) (*Detariffing Order*).

[12] ACI Comments at 17.

[13] According to IPs, billing and collection "defines 900 service," LO-AD Communications of Nevada, Inc. (LO-AD) Comments at 5, and "is the raison d etre for 900 service." Association of Information Providers of New York (AIPNY) Comments at 2. *See also* EFF Comments at 7.

[14] Sprint Telemedia Comments at 7.

[15] Section 3(a) of the Communications Act, 47 U.S.C. §153(a), defines "communication by wire," to include "services . . . incidental to such transmission."

[16] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rulemaking, CC Docket No. 91-115, 7 FCC Rcd 3528, 3533 n.50 (1992) (*Joint Use Calling Cards*), *appeal denied sub nom.* Capital Network System, Inc. v. FCC, 3 F.3d 1526 (D.C. Cir. 1993).

[17] The *Detariffing Order* stated that the Commission lacks Title II jurisdiction over billing and collection by a LEC for an unaffiliated IXC because such financial and administrative services are not communication services for the purpose of Title II. Yet, the decision also held that the Commission could exercise Title I jurisdiction over such billing and collection based on its apparent incidental connection to communication by wire. 102 FCC Rcd at 1168-69. That language was clarified in Public Service Commission of Maryland, 4 FCC Rcd 4000, 4004 (1989), *aff'd on other grounds sub nom.* Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1512 (D.C. Cir. 1990) (*PSC of Maryland*). *See also*, Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rulemaking, CC Docket No. 91-115, 7 FCC Rcd 3528, 3533 n.50 (1992) (*Joint Use Calling Cards*), *appeal denied*, Capital Network System, Inc. v. FCC, 3 F.3d 1526 (D.C. Cir. 1993).

[18] *Detariffing Order*, 102 FCC 2d at 1168; *PSC of Maryland*, 4 FCC Rcd at 4004; *Joint Use Calling Cards*, 7 FCC Rcd at 3533 n.50. ACI also argues that Title II would apply here even if billing and collection is not a common carrier service, because section 202(a)'s prohibition against unreasonable discrimination applies to "practices, . . . in connection with like communication." ACI states that this provision should be read to apply to incidental communication services that are bundled with common carrier services even if the incidental services are not themselves common carrier services. ACI claims that California v. FCC, 905 F.2d 1217 (9th Cir. 1990) and NARUC v. FCC, 880 F.2d 422 (DC Cir. 1989) both support its position that section 202(a) does not require the incidental services to be common carrier services. We disagree. While the decisions cited by ACI deal with section 2(b)(1) of the Communications Act, which uses language very similar to section 202(a), the legislative his-

not be a common carrier in other roles.[19] Thus, that Sprint Telemedia is a common carrier for other purposes is not determinative.

13. The Commission most recently considered the question of whether a service is a common carrier service in *Joint Use Calling Cards*. In that decision, the Commission noted that under *NARUC I*, it has considered the extent to which the service provider faces competition in the provision of the service at issue. Using this framework, we will examine whether Sprint Telemedia's provision of the billing and collection at issue should be treated as common carriage.

14. *Comments*. ACI states that Sprint Telemedia's 900 billing and collection service should be treated as common carriage because non-carrier alternatives to carrier billing and collection are impractical given that carriers can avoid many costs faced by non-carriers. Carriers already mail bills to callers, use BNA (billing name and address) data to process their regular bills, and thus enjoy economies of scale in billing.[20] Association of Information Providers of New York (AIPNY) argues that "[t]here is simply no competitive market for 900 service."[21] ACI and AIPNY also ask us to revisit earlier decisions about the competitive nature of the billing and collection market and the availability of potential competitors.[22] LO-AD Communications of Nevada, Inc. (LO-AD), however, admits that "ITA, a relatively new third party billing company . . . looks promising."[23] Electronic Freedom Foundation, Inc. (EFF) argues that low volume IPs cannot afford to bear the cost of third party billing and collection systems.[24] National Association of Broadcasters and American Newspaper & Publishers Association (NAB/ANPA) states that alternative billing and collection services usually require the use of more cumbersome credit cards, which may increase fear of fraud, and LO-AD notes that many consumers lack credit cards.[25]

15. LO-AD contends that "[t]he cost of alternate billing, no matter what method is chosen, exceeds carrier billing many times over."[26] and ACI and LO-AD present some information on billing and collection rates for both carrier and non-carrier providers. ACI asserts that, in its experience, the typical per call billing and administrative costs of a carrier-billed information call is about ten percent of the user charge. Hence, it estimates that a hypothetical four minute call (at 95 cents per minute) would cost the IP 38 cents for billing and collection, plus about $1.20 for transport, for a total of $1.58 in billing, collection, and transport costs for a $3.80 call. In comparison, ACI states that a typical per-call direct billing arrangement can cost anywhere from 75 cents to $1.50 per call.[27]

16. IXCs respond by arguing that there are a sufficient number of competing billing and collection services for an effective market place to function. A few IXCs refer to a February 1992 article in *InfoText* magazine, which lists eleven competing billing and collection firms serving 900 service IPs.[28] MCI argues that IPs could bill for themselves by using credit cards or contract with any of the non-carrier entities that currently provide billing and collection. MCI states that the only bottleneck that would limit competition is access to BNA and that BNA must be provided by LECs on a reasonable basis.[29]

17. SW Bell and US West both argue that it is LEC -- not IXC -- billing and collection that IPs actually seek access to here.[30] Yet Ameritech and US West both note that they have already expressly refused to bill for programs that they found to be harmful to their reputation.[31] ACI states that it "agrees with US West that LEC billing and collection for interexchange 900 service appears to fall under the *Detariffing Order*," but it asks that the application of the decision be considered anew in view of the changed pay-per-call marketplace.[32]

18. *Discussion*. Based on the evidence presented by the parties, we find that the billing and collection services that IXCs provide to IPs are open to even greater potential competition than the LEC billing and collection services, which the Commission found to be subject to competition in its *Detariffing Order*.[33] These services are also susceptible to greater competition than we found for the billing and collection for 900 services that were deemed not to constitute common carriage in *AT&T Dial-It Services*.[34] The IPs have not presented evidence that would lead us to deviate from these prior decisions and treat the billing and collection service at issue here as common carriage, particularly after our recent decision requiring LECs to tariff the provision of BNA.[35]

19. IPs argue that economies of scale prevent new firms from competing with larger IXCs in the provision of 900 billing and collection services. We already rejected this argument in the context of LEC billing and collection

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tory and related context of 2(b)(1) are very different and inapposite to section 202(a). As the Ninth Circuit noted, "[s]ection 2(b)(1)[47 USC §152(b)(1)] is phrased in broad terms that sweep beyond Title II." 905 F.2d at 1241 n.35. Section 202(a) does not have a similarly broad sweep.

[19] National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC I*).

[20] ACI Pet. at 24-27.

[21] AIPNY Reply at 5.

[22] ACI Reply at 20; AIPNY Reply at 5 n.4.

[23] LO-AD Reply at 5.

[24] EFF Comments at 7.

[25] NAB/ANPA Comments at 4; LO-AD Reply at 4.

[26] LO-AD Reply at 6.

[27] ACI Reply at 17.

[28] Jack Schember, "Private Billing: Third-party agents help information sponsors control billing and collection," *InfoText*, February 1992, at 40-46, included in AT&T Comments Exhibit A.

[29] MCI at 6.

[30] SW Bell Comments at 2-3; US West Comments at 15-16. Statements by the IPs appear to support this. As LO-AD states, it is the LEC that "bills the caller on behalf of and pursuant to a negotiated billing arrangement with the IXC." LO-AD Comments at 3. *See also*, Sprint Telemedia Comments at 3. Moreover, as AIPNY asserts, "[w]ithout *LEC billing and collection*, it is not economically feasible for IPs to offer their services to the public," and thus "Sprint and other IXCs marketed the salient feature of 900 service as being the unique access to *the LEC bill* that 900 service affords." AIPNY Comments at 2 (emphasis added).

[31] Ameritech Comments at 4; US West Comments at 11-12.

[32] ACI Reply at 19 n.32.

[33] 102 FCC 2d at 1170.

[34] AT&T Dial-It Services and Third Party Billing and Collection Services, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3433 (1989) (*AT&T Dial-It Services*).

[35] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Second Report and Order, CC Docket No. 91-115, 8 FCC Rcd 4478 (1993).

when we found that that service was subject to competition,[36] and IXC economies would almost certainly be smaller than LEC economies. In fact, IXCs refer to eleven competing 900 number billing and collection services listed in the February 1992 *InfoText* article, and LO-AD even admits that one of those services, ITA, "looks promising" as a new third party billing alternative.

20. We are also not persuaded to depart from Commission precedent by accepting the IP assertion that it is not practical for them to rely on the use of credit cards because the cards are too cumbersome and inhibit spontaneous access. As the *Infotext* article notes, some firms in the industry use them successfully, which is consistent with our conclusion in the *Detariffing Order* that credit card companies can provide competition in this market.[37] IPs do not make it clear why the danger of credit card fraud is greater here than in other situations involving telephone ordering. Furthermore, we do not find the pricing data that ACI and LO-AD offer in their reply comments to be persuasive.[38]

21. Finally, we note that while IPs are formally petitioning for access to IXC billing and collection services, their comments primarily concern their desire for access to LEC billing and collection. The factors that IPs identify as preventing non-carriers from providing competitive billing and collection services actually relate to the LECs rather than IXCs, like Sprint Telemedia. The IPs' primary demand appears to be for access to IXCs due to the IXCs' ability to secure access to LEC billing and collection services.

22. Under these circumstances, we conclude that the billing and collection services provided by IXCs for IPs is subject to even more competition than the billing and collection services provided by LECs in the *Detariffing Order* and by AT&T in the *AT&T Dial It Order* and thus there is even less reason to treat it as common carriage. Therefore, we find that Title II of the Communications Act does not apply to it. The situation before us regarding Sprint Telemedia billing and collection for IP services is radically different from that involved in *Joint Use Calling Cards*, where the Commission concluded that, in light of the need for access to LEC databases, only the LECs could provide accurate up-to-date calling card validation service.

B. Is the Exercise of Title I Jurisdiction Warranted?

23. Absent Title II jurisdiction, there is still the question of whether we should exercise Title I jurisdiction over 900 billing and collection service. Title I permits us to exercise ancillary jurisdiction over communications services if such regulation is "necessary to ensure the achievement of [our] . . . statutory responsibilities."[39] IPs offer four main reasons why the Commission should exercise jurisdiction over the billing and collection services at issue: 1) the lack of alternative billing and collection services for IPs, 2) the unreasonableness of Sprint Telemedia's discrimination against IPs, 3) the need to protect the First Amendment and freedom of expression, and 4) the encouragement and promotion of new and innovative services and technologies. We find, for the reasons previously discussed, that the record does not support the exercise of Title I jurisdiction based on the first of these assertions. We also find that the record does not support the exercise of Title I jurisdiction based on the remaining three claims.

24. *Comments.* IPs first argue that we should take action because it is unreasonably discriminatory for Sprint Telemedia to refuse to provide billing and collection for all of ACI's services, absent any allegation that ACI's services are unlawful, fraudulent, or deceptive.[40] They assert that permitting Sprint Telemedia to discriminate among IPs in its provision of billing and collection based on its tastes, its concern for its image, or other subjective criteria should not be permitted.[41] They claim that Sprint Telemedia's image would not be harmed by serving IPs it finds offensive since the public could not determine which carrier was responsible for transmitting such offensive material and the public could not hold a common carrier responsible for the content of material for which it is billing.[42] LO-AD and People for the American Way & Telecommunications Research and Action Center (PAW/TRAC) argue that the use of separate bills within the billing envelope should make consumers aware of carrier neutrality in this area and that consumers should not associate the LEC with any offensive IPs.[43] LO-AD also claims that the experience of Pacific Bell supports LO-AD's position. LO-AD asserts that even though California does not permit Pacific to withhold its billing services from those 976 services that it finds objectionable, complaints about 976 service in California are at an all time low.[44]

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[36] *Detariffing Order*, 102 FCC 2d at 1170. IXCs may benefit from being able to combine two sets of bills in the same envelope, but competing firms could seek out other third party billing services, such as the clearinghouses we noted in our *Joint Use Calling Cards* order, 7 FCC Rcd at 3535-36, para. 41. Public utility firms, which also do monthly mass mailings, might also be approached. Furthermore, to the extent that IXCs rely primarily on LECs to prepare and mail IP bills, a competing firm could negotiate with the LEC and benefit from the same economies.

[37] 102 FCC 2d at 1170.

[38] ACI selects a hypothetical 4-minute $.95 per minute call to illustrate the point that the 10-percent billing and collection cost per call ($.38 per call here) is less than what it asserts are the typical $.75 to $1.50 direct billing costs for such a call. Not only does it fail to give its sources for the latter figures, but it does not even assert that a 4-minute call or a rate of $.95 per minute is typical in the industry. If, instead, one considered a 6-minute call at $1.25 per minute or a 4-minute call at $1.95 per minute, or a flat rate $10 call, the 10% typical commission used by ACI would exceed the $.75 minimum cost for a directly billed call. Such hypothetical pricing data is not sufficient to convince us that alternative billing and collection services are economically impractical.

[39] *PSC of Maryland*, 4 FCC Rcd at 4005, citing Computer and Communications Industry Assn. v. FCC, 693 F.2d 198, 213 (D.C. Cir. 1982), *cert. denied sub nom.*, Louisiana PSC v. U.S., 461 U.S. 938 (1983), citing United States v. Southwestern Cable Co., 392 U.S. 157 (1968). *See also*, *Detariffing Order*, 102 FCC 2d at 1170.

[40] ACI Pet. at 13; PAW/TRAC Comments at 16; Syncronet/IDC at 9.

[41] ACI Pet. at 15-16; LO-AD Comments at 6, 8; NAB/ANPA Comments at 6; PAW/TRAC Comments at 3, 17.

[42] LO-AD Comments at 6; PAW/TRAC Comments at 18.

[43] LO-AD Reply at 7; PAW/TRAC Comments at 18.

[44] LO-AD Reply at 7.

25. ACI, EFF, and PAW/TRAC also contend that Sprint Telemedia's refusal to provide billing and collection services abridges IPs' freedom of expression and represents a threat to First Amendment values.[45] Syncronet/IDC argues that, without non-discrimination requirements, 900 service content will be bland.[46] LO-AD states that it is in the public interest to foster access for the greatest variety of information services and that services should not be excluded merely because a fraction of one percent of 900 users deem them to be unacceptable.[47] Finally, PAW/TRAC expresses concern that it will be denied access to billing and collection services for messages concerning activities that might be perceived as advancing political and regulatory positions contrary to those of an interexchange carrier.[48]

26. Finally, ACI argues that the Commission's obligation to encourage and promote new and innovative services and technologies provides a compelling basis for assertion of Title I authority to prevent discrimination in billing for information services.[49] PAW/TRAC asserts that Sprint Telemedia's policy is unreasonable because it "effectively shuts the door on newly established firms, preventing them from fairly competing in the marketplace."[50] More generally, LO-AD argues that the Bell companies will strive to dominate the dial-it information service business and use their local monopolies to achieve the result.[51] Syncronet/IDC asserts that carriers are learning from IPs and preparing to take over. It fears that the time will soon come when the only IPs left will be LECs and IXCs.[52]

27. Sprint Telemedia argues that the explanation it gave in its 1991 press release demonstrates the reasonableness of its actions. There, Sprint Telemedia stated that it was almost completely withdrawing from providing 900 billing and collection service because, "despite its rigorous guidelines, it could not ensure that IPs provided valuable, useful programs to the public."[53] In the press release, Sprint Telemedia also revealed there that it had been notified by the US Attorney's office in Des Moines, Iowa that it was a target of a grand jury investigation, in part because it had provided billing services to an IP that the US Attorney was preparing to indict on several fraud-related charges.[54] Sprint Telemedia also pointed out the difficulty of attempting to police the nature of and charges for service offerings by numerous 6 information service providers. It defends its conduct as perfectly reasonable as well as legal.[55]

28. National Consumers League and Consumer Action (NCL) support Sprint Telemedia's position. They argue that Sprint Telemedia has applied its criteria regarding the 900 services for which it would provide billing and collection in the same fashion as MCI and AT&T have applied their criteria, and that even ACI acknowledges the latter to be lawful.[56] MCI states that if reasonable criteria are developed for determining whether billing and collection will be provided, and they are applied equally and in a nondiscriminatory manner, there would be no violation of the Act. In addition, Syncronet/IDC states that it understands that many actions taken by carriers were necessary to eliminate serious abuses.[57]

29. Ameritech states that it has had a policy of refusing to bill for programs that it considers either harmful to its reputation or a potential financial nuisance to its customers. It also offers subscribers free blocking of access to 900 and 976 numbers. It believes that this has ameliorated many of the problems that customers have had with pay-per-call services.[58] US West also describes its difficulties with 976 pay services due to numerous customer, governmental, and editorial complaints. US West states that, because it found that its reputation was being damaged, it refused to carry certain services on the 976 numbers for which it provided billing. US West found it difficult to try to distinguish between acceptable and unacceptable programming in many areas.[59] US West asserts that LECs also have First Amendment rights, including the right not to speak and not to associate and it claims support for this position from two Supreme Court decisions.[60] Responding to LO-AD's representations concerning the treatment of 976 service in California, Pacific states that it limits "harmful matter" IPs to a specific 900 prefix and does not provide billing and collection to them.[61]

30. *Discussion.* After reviewing the current record, we do not find that exercising Title I jurisdiction is necessary to ensure achievement of our statutory responsibility. To begin with, we do not find any First Amendment violation by Sprint Telemedia, for the First Amendment only prohibits governmental actions that abridge speech. This prohibition does not directly apply to business decisions by private entities.[62] No party has even suggested that Sprint Telemedia's refusal to provide billing and collection service to IPs represents governmental action.

31. Furthermore, we cannot conclude that Sprint Telemedia's actions would harm First Amendment values, such as diversity of information sources. Sprint Telemedia has not denied IPs access to its transmission facilities, only to its billing and collection service. There is no basis in the current record for even concluding that the lack of IXC billing and collection will significantly threaten the avail-

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[45] ACI Reply at 5; EFF Comments at 3; PAW/TRAC Comments at 5.
[46] Syncronet/IDC Comments at 6-9.
[47] LO-AD Reply at 6-7.
[48] PAW/TRAC Comments at 3.
[49] ACI Reply at 19.
[50] PAW/TRAC Comments at 7-9.
[51] LO-AD Comments at 9.
[52] Syncronet/IDC Comments at 7-8.
[53] Sprint Telemedia Comments at 4.
[54] *Id.*, Exhibit A at 3.
[55] *Id.*
[56] NCL Comments at 11-12, citing ACI Pet. at 30. MCI agrees that the Sprint Telemedia and the AT&T actions are similar. MCI Comments at 4.
[57] Syncronet/IDC Comments at 9.
[58] Ameritech Comments at 4.
[59] US West Comments at 11-14.
[60] *Id.* at 4, 11, and 17, citing *Pacific Gas & Electric v. PUC of California*, 475 U.S. 1 (1986); *Tornillo v. Miami Herald Pub. Co.*, 418 U.S. 241 (1974). US West also cites *Carlin Communications v. Mountain States . . .*, 827 F.2d 1291, 1293-95 (9th Cir. 1987) ("Carlin").
[61] Pacific Reply at 2.
[62] *See* Information Providers' Coalition v. FCC, 928 F.2d 866, 877 (9th Cir. 1991); Carlin Communications, Inc. v. Mountain States Telephone and Telegraph Co., 827 F.2d 1291, 1295 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988); Carlin Communications, Inc. v. Southern Bell, 802 F.2d 1352, 1357 (11th Cir. 1986).

ability of 900 services, much less that it would deprive the American public of an ample array of alternative information sources.

32. Nor do we believe that we should require that Sprint Telemedia offer billing and collection for all 900 services to foster new and innovative services and technologies. The parties have failed to demonstrate that the public interest in service and technological innovation is threatened by Sprint Telemedia's decision not to provide billing and collection for certain 900 service providers.

33. Finally, we find no evidence on the record that Sprint Telemedia has acted in an unreasonable manner in limiting the provision of 900 billing and collection service. In evaluating the reasonableness of its actions, we find it helpful to consider the standard for reasonableness articulated by the Ninth Circuit court in *Carlin Communications v. Mountain States Tel. & Tel.*, 827 F.2d 1291, 1294 (9th Cir. 1987). In that case, a supplier of adult entertainment messages sought to enjoin a local telephone company from refusing to carry those messages on its 976 network. The court held the carrier to a standard of nondiscrimination that did not preclude distinctions based on reasonable business classifications. In evaluating whether the carrier's refusal to serve the IP constituted an impermissible discrimination, the court considered three factors. First, it asked whether the carrier's policy of refusing to serve the IP was directed arbitrarily at the IP. Second, it considered whether the carrier had a legitimate interest in protecting itself from the consequences that might arise from serving the IP. Finally, it asked whether the carrier was furthering a state policy.

34. In the instant case, as we have already explained, Sprint Telemedia is not acting in the role of a common carrier when it provides billing and collection services. Therefore, it cannot be held to as strict a standard of conduct as a common carrier. Yet it still meets the standards of reasonable conduct established in the *Carlin* case. First, there is no evidence that Sprint Telemedia arbitrarily acted against ACI or other IPs. Rather, its gradual efforts to alleviate its problems with 900 services, as described above,[n3] appear entirely reasonable.

35. Second, although some IPs argue that customers should not associate an IXC with the services that it sends bills for and thus a refusal to bill for messages that generate consumer complaints is not permissible, this ignores the empirical evidence that customers actually do make such an association. The experiences of Sprint Telemedia, Ameritech, and US West demonstrate that customers, the press, and even some government bodies, associate the billing firm with the underlying 900 services, including any problems associated with those services. In particular, the record shows that Sprint Telemedia was adversely affected by criticisms of unpopular 900 services, for which it provided billing and collection. Sprint Telemedia's actions appear to be a reasonable response to this situation.

36. In conclusion, we find no reason to exercise our Title I jurisdiction in this case. The First Amendment does not bar Sprint Telemedia's actions. The public interest in the promotion of First Amendment values as well as innovative services and technologies does not require remedial action. We also find no basis for concluding that Sprint's actions were unreasonable.[n4]

IV. CONCLUSION AND ORDERING CLAUSES

37. This order denies ACI's petition for declaratory ruling that Sprint Telemedia must provide billing and collection service to IPs. Rather, we conclude that the Commission lacks Title II jurisdiction over the billing and collection service at issue because it is not a common carrier service, and that the assertion of Title I jurisdiction is not necessary to ensure the achievement of our statutory responsibilities.

38. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205 303(r), and 405, the petition for declaratory ruling IS DENIED for the reasons set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

APPENDIX A

Comments

American Telephone & Telegraph (AT&T)

Ameritech Operating Companies (Ameritech)

Association of Information Providers of New York (AIPNY)

Electronic Freedom Foundation, Inc. (EFF)

LO-AD Communications of Nevada, Inc. (LO-AD)

MCI Telecommunications Corp. (MCI)

MJ Denton Productions

National Association of Broadcasters and American Newspaper & Publishers Association (NAB/ANPA)

National Consumers League and Consumer Action (NCL/CA)

National Media Marketing, Inc. (NMM)

People for the American Way & Telecommunications Research and Action Center (PAW/TRAC)

Southwestern Bell Telephone Company (SW Bell)

Syncronet, Inc. and Integrated Data Concepts, Inc. (Syncronet/IDC)

[n3] *See* section II, *supra*.

[n4] Since we find Sprint's actions reasonable, we need not specifically address what actions would warrant the exercise of jurisdiction under Title I.

US Telecom. Inc (Sprint Telemedia)
US West Communications Inc (US West)

Reply Comments

ACI
AT&T
AIPNY
LO-AD
MCI
Pacific Bell & Nevada Bell (Pacific)
Sprint Telemedia
US West

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

Data Investments, Inc. File No. 163500-91-21-DHS

Notice of Apparent Liability for Forfeiture for the unauthorized construction and operation of facilities of Station KUC843 and Station KWU516 in the Public Land Mobile Service at Bainbridge and Cape Girardeau, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: November 29, 1993; Released: December 15, 1993

By the Commission: Chairman Hundt not participating.

I. INTRODUCTION

1. Data Investments, Inc. (Data) has filed a Petition for Reconsideration (Petition) which requests remission or reduction of the $150,000 forfeiture that the Commission proposed in a "Notice of Apparent Liability for Forfeiture" (NALF), released July 19, 1991.[1] *See Data Investments, Inc.*, 6 FCC Rcd 4496 (1991). For the reasons discussed below, we are denying the request.

II. BACKGROUND

2. Data is jointly owned by Timothy J. Singleton (Singleton) and Marilyn K. Singleton, his spouse. Data is a Public Land Mobile Service (PLMS) licensee in the Cape Girardeau, Missouri, area, doing business through Star Communications, Inc. (Star), which Singleton also utilized as a management company.[2] On July 31, 1989, Data entered into a management agreement with Ruth H. Withers (Withers), 100 percent owner of Withers Communications Company (WCC), for Data to operate and manage the captioned stations, KUC843 and KWU516, that had been licensed to WCC, also in the Cape Girardeau, Missouri area.

3. These station licenses expired on April 1, 1989, and WCC filed applications to reinstate them on August 4, 1989. On October 23, 1989, a Petition to Deny was filed against the reinstatement applications by Dial-A-Page, alleging that Data was operating and in control of WCC's stations without obtaining prior Commission authority. On December 8, 1989, WCC filed an Opposition pleading. The same day, Data separately filed a letter through its counsel, reporting that it had suspended the management agreement with WCC in regard to all functions concerning WCC's facilities.

4. On August 23, 1990, Withers reported to the Mobile Services Division (MSD), Common Carrier Bureau, that Singleton, without permission, had relocated the facilities of Stations KUC843 and KWU516. Subsequently, the MSD sent letters of inquiry to Singleton and Withers seeking information regarding the reported relocation.[3] Withers responded that the station facilities had been located at sites leased from her sons and that she learned of the move of the facilities when she visited the sites in July 1990. The MSD found Singleton's response insufficient and sent him a second letter.[4]

5. In his response to the second MSD letter, Singleton stated that without prior Commission authorization he had relocated the transmitter and antenna for WCC Station KUC843 on October 24, 1989. He also stated that in a letter to Withers, dated October 26, 1989, he suspended the management agreement, but continued to operate the two WCC stations through Star, his management company. Singleton acknowledged that Star received all the money paid by the station subscribers and deposited it in its bank account, paid station expenses, and hired one management employee for the stations. Singleton further admitted that on July 23, 1990, he moved the transmitter and antenna for Station KWU516 from Bainbridge, Missouri, to Cape Girardeau, and that on July 29, 1990, he moved the control stations for both stations, KUC843 and KWU516. All of the above relocations, he acknowledged, occurred without prior Commission authorization. Singleton stated that he discontinued operations on October 25, 1990.

6. In the NALF, we found that upon suspending its management agreement with WCC, Data ceased acting as WCC's agent. We also found that no transfer of control application was ever filed to assign control of WCC's stations to Data or Singleton, and Data had not requested authority to operate the stations on the frequencies that had been licensed. As a result, we concluded, Singleton's use of WCC's call signs was unauthorized, and Data's relocation and continued operation of WCC's facilities following suspension of the management agreement constituted violations of Sections 301 and 319(a) of the Communications Act (the Act) and Sections 22.3 and 22.43(a)(1) of the Commission's Rules. Pursuant to Section 503(b) of the Act, we considered the relevant factors in this case, including the gravity of Singleton's offenses, his failure to provide complete information, and his ability to profit from his actions through Data and Star, and determined that a forfeiture of $150,000 should be assessed for unauthorized construction and operation of base and control facilities of WCC's stations.[5] We also determined that although Withers had failed to renew her licenses and

[1] Data also filed on August 6, 1992, a Supplement to Petition for Reconsideration, submitting updated financial information that the Commission requested. *See* Letter from Chief, Mobile Services Division, to Counsel for Data (July 22, 1992).

[2] Data is a PLMS licensee for Stations KNKC272 at Jackson, Missouri, and KNKJ977 at Oriole, Missouri. In addition, Data is licensed for Stations KNKC934 and KNKC938 at Cape Girardeau, Missouri, doing business as Buzz Communications.

[3] Letter from Chief, MSD, to Timothy J. Singleton (Oct. 2, 1990); Letter from Chief, MSD, to Ruth H. Withers (Oct. 2, 1990).

[4] Letter from Chief, MSD, to Timothy J. Singleton (Nov. 20, 1990).

[5] *See* 47 U.S.C. § 503(b)(2).

oversee Data, thereby abdicating her responsibility as a licensee, she had withdrawn WCC's applications for reinstatement and remedial action against her was unnecessary.[6]

III. DATA PETITION

7. In its Petition, Data contends that Singleton's conduct should be viewed as an unauthorized transfer of control of facilities rather than unauthorized construction and operation. Data submits that on July 31, 1989, in addition to the management agreement with Withers, it entered into a Purchase Agreement for $250,000 for the sale of certain assets of W.J. Withers Communications Company (WJCom), a company owned by Withers' son, W.J. Withers. Withers, asserts Data, had previously transferred to her son the assets of Stations KUC843 and KWU516.[7] Subsequent to these agreements, admits Data, Singleton assumed the role of owner and operator of the stations without prior Commission approval for a transfer of control from WCC. But Data argues that a forfeiture of $150,000 is excessive in this case, especially because the former licensee of record was not assessed a forfeiture, citing *Brian L. O'Neill*, 6 FCC Rcd 2572 (1991) ($25,000 forfeiture levied against both buyer and seller).

8. Next, Data argues that the relocations of WCC facilities were permissive under the Commission's Rules because there was no increase in the reliable service area contours. Therefore, it argues, it should be penalized for a minor violation of failing to file the notification for such modifications on FCC Form 489 under Section 22.9(d)(6), rather than for unauthorized construction.

9. Data also contends that the failure of Singleton to provide complete information during the course of this proceeding does not justify the forfeiture. *See NALF*, at para. 8. Data states that Singleton's counsel was not aware of the relocation of Station KUC843 when the December 8, 1989, letter was filed following the petition against WCC's reinstatement applications. It asserts that Singleton was under a misconception as to what he could not do pursuant to Commission Rules upon suspension of the management agreement.

10. Data adds that there are mitigating circumstances that support remission or reduction of the forfeiture. It asserts that after Singleton began to manage WCC's stations, he discovered interference to its operations that he believed created an "emergency" situation for its subscribers in the local medical community. According to Data, Singleton thought that Commission Rules permitted relocation of the facilities if the service contours remained within those authorized. Data also asserts that Singleton did not believe he had authority to file Form 489 notifications, and in April 1990 made attempts to have Withers prepare them. In addition, Data states, one of the alleged violations, relocation of the control station for Station KUC843, did not occur because that station was served by telephone link.[8] Moreover, asserts Data, it is facing a loss of $250,000 from the Purchase Agreement with WJCom due to Withers' withdrawal of WCC's reinstatement applications.

11. Moreover, Data claims, its balance sheet as of December 31, 1990, shows total current assets of only $72,745.82, and its income statement for 1990 shows a net operating loss of $48,265.13. It also submits that it incurred net losses of $101,382.95 for 1989, and $137,156.33 for 1990. Data includes the statement of its accountant that it cannot pay a penalty of $150,000 without favorable financing and an increase in revenues.

IV. DISCUSSION

12. Data contends that its conduct should be classified as an unauthorized transfer of control by WCC and Data, with permissive relocation of facilities by Data's principal, Singleton, rather than unauthorized construction and operation. We reject Data's contention that its conduct does not constitute unauthorized construction and operation. As the NALF expressly stated:

> Singleton acknowledged in his letter of December 7, 1990 that he constructed the PLMS stations without prior authorization and operated those stations from October 24, 1989 to October 25, 1990 without having obtained prior Commission authority.

6 FCC Rcd at 4497, para. 7. Data was required to comply with Sections 301 and 319(a) of the Act and Sections 22.3 and 22.43(a)(1) of the Commission's rules to be properly authorized to construct and operate the subject PLMS stations during this period. *See* 6 FCC Rcd 4497, para.7; 4498 n.5. Because it was uncontroverted that Data lacked any such authorization from the Commission, the NALF cited Data for violations of these sections of the Act and the rules. In addition, the record shows that Singleton was acting entirely without authority from Withers when he moved Withers' licensed facilities to new locations and continued their operation. Singleton claims he acted as a transferee because he purchased station assets (*i.e.*, equipment) from Withers' son, but Singleton had knowledge, as shown by the management agreement, that WCC was owner of the licenses and was to retain unfettered use of station facilities. In short, Singleton misappropriated WCC's stations for his own interests and used the call signs issued to WCC without prior authorization from the Commission.[9] Even were we to consider Singleton's actions as an unauthorized transfer of control,[10] it does not affect our conclusion that he engaged in unauthorized construction and operation under the Act and our Rules.[11] Thus, our

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[6] *See* Letter from Counsel for WCC to Chief, MSD (Jan. 15, 1991); Public Notice, Report No. PMS-91-21-A (released Feb. 20, 1991).

[7] The management agreement shows Data's recognition that the licenses remained under Withers' company, WCC. *See also* Response from Ruth H. Withers to Chief, MSD (Nov. 5, 1990).

[8] *See* Petition for Reconsideration, Exhibit 2, Declaration of Timothy J. Singleton. However, Singleton's statement in his Declaration with regard to the KUC843 control station remains contradicted by his letter of December 7, 1990, in which he states that he did move that control station. *See, infra*, note 14.

[9] We find no evidence in the record that would controvert our conclusion that Singleton's actions were taken unilaterally. Moreover, Data's reference to *Brian O'Neill* is unavailing because there we found what amounted to an inadvertent transfer of control, not an intentional usurpation of facilities.

[10] *See* 47 U.S.C. § 310(d); 47 C.F.R. § 22.39.

[11] *See supra*, para. 6; *see* 47 U.S.C §§ 301 and 319(a); 47 C.F.R. §§ 22.3 and 22.43(a)(1).

finding that Data's actions in this case constituted unauthorized construction and operation of facilities will be sustained.

13. We also reject Data's argument that its relocations of WCC's facilities were permissive and should result in a minor violation for having failed to file FCC Forms 489.[12] Singleton's relocations cannot be considered permissive because a non-licensee has no authority to make such changes.

14. Data also contends that there was no control station associated with Station KUC843 because that station was served by a telephone link. Singleton fails to provide any support for his revised contention. *See supra*, para. 10, note 8. In fact, his claim of an oversight[13] in his second response to the MSD's inquiry is contradicted by his demonstration of specific knowledge regarding the location and movement of the control facility.[14] Commission records also show that there was a specific authorization for a control facility for Station KUC843 and that WCC sought to reinstate authority for it.[15] Therefore, we conclude that Data's contention is unsupported by the record in this case.

15. Next, we find without merit Singleton's contention that the $150,000 forfeiture is not justified by his failure to be completely forthcoming with information. *See supra*, at para. 9. When Data filed its December 8, 1989, letter responding to the petition against WCC's reinstatement application and reporting that it had suspended the management agreement, the fact that Singleton's counsel may not have been aware of the relocation of Station KUC843 and that Data was under a misconception as to what it was permitted to do is immaterial. It is plain from the record that Singleton failed to inform the Commission of the construction at the new locations and continued operations during the course of the proceeding until he received the Commission's first letter of inquiry. Even then, a second letter was required to obtain more specific information and an account of what occurred. *See supra*, at para. 4. Failure to provide complete and timely information, unauthorized construction, and continued unauthorized operation, together, contribute to the egregious nature of the violation and warrant the substantial forfeiture.[16]

16. Further, we find Singleton's assertions as to his motivations and understanding of Commission Rules are unavailing.[17] Data is held to full knowledge of Commission Rules because it is a paging licensee in the Cape Girardeau area. It therefore bears responsibility for its own acts and omissions. *See, e.g., Lorain Community Broadcasting Co.*, 18 FCC 2d 686 (1969). Finally, Data's purported potential loss of $250,000 from the WJCom Purchase Agreement, asserted by Data as a mitigating factor in this case, represents a private contractual matter that is more properly resolved in a state proceeding.

17. Data's assertions of losses from its operations and resulting inability to pay are also unpersuasive. A licensee's gross revenues are generally the best indicator of its ability to pay a forfeiture. *See PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992). If gross revenues appear sufficiently higher than operating losses, the existence of operating losses alone does not mean that a business cannot afford to pay. *Id.* The financial information submitted by Data shows that it had gross revenues of $376,215.06 for 1990, $337,334.75 for 1991, and an estimated $273,300.06 (on an projected annual basis) for 1992.[18] Thus, its gross revenues (including revenues from its authorized stations) average approximately $330,000 annually over a three year period. *See supra*, note 2. This amount is more than double the amount of the forfeiture.[19] In considering Data's complete financial status, we find that its gross revenues are sufficient to enable Data to pay the forfeiture of $150,000.

18. We believe the amount of the forfeiture is warranted because the facts demonstrate egregious action by Singleton in constructing and operating facilities without Commission authority. Quite apart from the amount of forfeiture, an alternative remedy for conduct that we find intentional and egregious is revocation. We have chosen the lesser remedy of forfeiture in this case because the facts do not reveal misconduct in Singleton's other licensed activities.[20]

19. Finally, we reject Data's claim that the forfeiture is excessive because we did not penalize Withers in the *NALF*. We noted that Withers had dismissed her reinstatement applications, ceasing to be a Commission licensee. The record indicates that Withers apparently wanted to have WCC's stations managed while eventually selling them so that she could retire. In view of these factors and the nature of Singleton's conduct, we find no basis to change our determination not to impose a sanction solely on Data.

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[12] *See* 47 C.F.R. §22.9, which requires the licensee (or his agent) to file an FCC Form 489 upon completion of authorized construction.

[13] *See* Petition for Reconsideration, Exhibit 2, Declaration of Timothy J. Singleton.

[14] *See* Response of Timothy J. Singleton to Chief, MSD (Dec. 7, 1990). In this letter, Singleton states that he ". . . toured the facilities [of Station KUC843] . . ." that ". . . KUC843 had its control station at 1320 N. Kingshighway in Cape Girardeau . . ." and that "[o]n July 29, 1990, I moved the control stations for KUC843 on 72.38 MHz and KWU516 . . ." *Id.* at 2 and 4. Singleton also corrects his reference to the control station as a control point in his prior response of November 5, 1990. *Id.* at 4.

[15] *See* reinstatement application, File No. 31506-CD-P/L-1-89, and Amendment, filed Dec. 27, 1989, for Station KUC843.

[16] The fact that Singleton now admits that there was also an unauthorized transfer of control underscores the egregious nature of the violation.

[17] For example, the Commission's Rules give no authority to a licensee to determine unilaterally that an "emergency" warrants relocation of a station.

[18] The latter figure represents twice the amount of the gross revenues, $136,650.03, from Data's operations for the first six months of 1992. *See* Supplement to Petition for Reconsideration.

[19] The annual average figure is also in line with Data's own projection of gross revenues of $354,000 for 1993. *See* Supplement to Petition for Reconsideration. We note that although there is an apparent decline in gross revenues from 1990 through 1992, there is also a decline in Data's operating losses. *Id.* Data has clarified that all of its FCC licensed stations are included in the information that it has provided.

[20] We note, however, that upon application for renewal of Data's licenses the matters decided in this case could be raised as factors relevant to the renewal determination.

V. CONCLUSION

20. On the basis of the foregoing, we conclude that Data has not justified remission or reduction of the forfeiture. In view of all of the facts and equities in this case, we believe that the violations of the Rules and the considerations pursuant to Section 503(b) of the Act warrant a substantial forfeiture on Data. We also affirm that there is no sufficient justification for us to change our evaluation of the former licensee, WCC, for Stations KUC843 and KWU516.

VI. ORDERING PARAGRAPHS

21. Accordingly, IT IS ORDERED that the Petition for Reconsideration requesting remission or reduction in the above-captioned proceeding, filed by Data Investments, Inc., IS DENIED.

22. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), the Data Investments, Inc., SHALL FORFEIT to the United States the sum of one hundred fifty thousand dollars ($150,000) for violation of Sections 301 and 319(a) of the Communications Act of 1934, 47 U.S.C. §§ 301, 319, and Sections 22.3 and 22.43(a)(1) of the Commission's Rules, 47 C.F.R. §§ 22.3 and 22.43(a)(1). Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

23. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

24. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Data Investments, Inc., by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton Public Television against Country Cable Systems — CSR-3944-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: December 14, 1993

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTO-TV, Oxford, Ohio, filed a complaint against Country Cable Systems ("Country Cable"), pursuant to Section 615 of the Communications Act, 47 U.S.C. §535. Greater Dayton requests that the Commission order Country Cable to carry WPTO-TV on Country Cable's cable system serving Greens Fork, Indiana, and that WPTO-TV be carried on Channel 14.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. See 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. §76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. §535(g)(4).

3. Greater Dayton contends that WPTO-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Country Cable's Greens Fork, Indiana, cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTO-TV: WPTO-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Oxford, Ohio, whose reference point, according to §76.53, is within 50 miles of the principal headend of Country Cable's Greens Fork, Indiana cable system. Accordingly, WPTO-TV meets the Commission's definition of a qualified local noncommercial educational television station. Greater Dayton has submitted a May 26, 1993 letter which it sent to Country Cable requesting carriage on Channel 14. According to Greater Dayton, Country Cable has neither commenced carriage nor responded in any way to Greater Dayton's request for carriage, nor has Country Cable submitted to Greater Dayton its channel lineup for the Greens Fork system.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because Greater Dayton has elected that WPTO-TV be carried on its over-the-air channel, Channel 14, we will grant its request that the Commission order Country Cable to carry WPTO-TV on Channel 14.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTO-TV, Oxford, Ohio (CSR-3944-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. §535). Furthermore, Country Cable Systems IS ORDERED to commence carriage of WPTO-TV on Channel 14 within forty-six (46) days from the release date of this *Order* on its system serving Greens Fork, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton Public Television against Country Cable Systems — CSR-3942-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: December 14, 1993

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTO-TV, Oxford, Ohio, filed a complaint against Country Cable Systems ("Country Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. §535. Greater Dayton requests that the Commission order Country Cable to carry WPTO-TV on Country Cable's cable system serving Holton (Ripley County), Indiana, and that WPTO-TV be carried on Channel 14.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. §76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. §535(g)(4).

3. Greater Dayton contends that WPTO-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Country Cable's Holton, Indiana, cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTO-TV: WPTO-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Oxford, Ohio, whose reference point, according to §76.53, is within 50 miles of the principal headend of Country Cable's Holton, Indiana cable system. Accordingly, WPTO-TV meets the Commission's definition of a qualified local noncommercial educational television station. Greater Dayton has submitted a May 26, 1993 letter which it sent to Country Cable requesting carriage on Channel 14. According to Greater Dayton, Country Cable has neither commenced carriage nor responded in any way to Greater Dayton's request for carriage, nor has Country Cable submitted to Greater Dayton its channel lineup for the Holton system.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because Greater Dayton has elected that WPTO-TV be carried on its over-the-air channel, Channel 14, we will grant its request that the Commission order Country Cable to carry WPTO-TV on Channel 14.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTO-TV, Oxford, Ohio (CSR-3942-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. § 535). Furthermore, Country Cable Systems IS ORDERED to commence carriage of WPTO-TV on Channel 14 within forty-six (46) days from the release date of this *Order* on its system serving Holton, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Fouce Amusement Enterprises, Inc. against Century Communications Corp. and Century Cable of California

CSR-4000-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: December 14, 1993

By the Chief, Mass Media Bureau:

1. On August 4, 1993, Fouce Amusement Enterprises, Inc. ("Fouce"), licensee of KRCA-TV, Riverside, California, filed a complaint against Century Communications Corp. and Century *et seq.* Fouce requests that the Commission require Century to carry KRCA-TV on its cable system serving Brea, California.

2. Section 614 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of local commercial television stations. Section 614(h)(1) defines a local commercial television station as any full power television station, other than a qualified local noncommercial educational television station, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.[1] *See* 47 U.S.C. §534(h)(1)(A). The definition of a local commercial television station excludes, however, any television station that would be considered a distant signal under 47 U.S.C. §111 (the Copyright Act), unless such station agrees to indemnify the cable operator for any increased liability resulting from carriage on the cable system. *See* 47 U.S.C. §534(h)(1)(B).

3. KRCA-TV is a commercial television station licensed to Riverside, California. Fouce notes that both Riverside and Brea are within the Los Angeles ADI and that the cable system serving Brea has about 50 channels in operation, of which fewer than 15 are in use for the retransmission of other local commercial television stations. Fouce presents the following evidence in its complaint: in a March 26, 1993 letter, Fouce notified Century that Fouce would be seeking to enforce KRCA-TV's must-carry rights; on May 1, 1993, Century sent Fouce a form letter stating that copyright liability may adversely affect KRCA-TV's must-carry rights; Fouce was ultimately advised orally by a representative of Century that Century believed that carriage of KRCA-TV would require the payment of additional copyright royalties; in a June 11, 1993 letter, Fouce sent Century proof that Brea is within 35 miles of KRCA-TV's city of license and that therefore, carriage of KRCA-TV would not result in increased copyright liability for Century; on June 14, 1993, Century sent Fouce a letter which stated that because KRCA-TV is a distant signal for copyright purposes, Fouce "will be responsible for reimbursing and indemnifying [Century] for certain copyright fees" and the letter contained an estimate of Fouce's copyright liability and a request for a Copyright indemnification agreement. On June 18, 1993, Fouce sent Century a notice of noncompliance with the mandatory carriage rules.

4. Fouce maintains that all communities served by the cable system are wholly or partially within the 35-mile zone of KRCA-TV's city of license, Riverside, and that, therefore, KRCA-TV would not be considered a distant signal under Section 111 of the Copyright Act. Fouce contends that KRCA-TV would have been a must-carry signal pursuant to former §76.61(a)(1) of the Commission's rules in effect on April 15, 1976, and is therefore a copyright-free signal under §§111(d) and (f) of the Copyright Act. *See* 17 C.F.R. §§111(d), (f).

5. We find that KRCA-TV meets the requirements of a local commercial television station entitled to carriage. We note that Fouce has presented evidence that carriage of KRCA-TV will not increase Century's copyright liability, and that Century has not filed an opposition challenging Fouce's assertion.

6. In view of the above, the complaint filed on August 4, 1993, by Fouce Amusement Enterprises, Inc., licensee of KRCA-TV IS GRANTED, in accordance with §614 of the Communications Act of 1934, as amended. *See* 47 U.S.C. §535. Furthermore, Century Communications Corp. and Century Cable of California ARE ORDERED to commence carriage of KRCA-TV within forty-six (46) days from the release date of this *Order* on its system serving Brea, California. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] A station's market for purposes of must-carry rights is its "area of dominant influence" or ADI, as defined by the Arbitron audience research organization. *See* 47 U.S.C. §534(h)(1)(C), which specifies that such market shall be determined in the manner provided in §73.3555(d)(3)(i), as in effect on May 1, 1991. This section of the rules, now redesignated §73.5555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's rules provides that the ADI's to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:
Complaint of Greater Dayton Public Television against Country Cable Systems — CSR-3945-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: December 14, 1993

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTD-TV, Dayton, Ohio, filed a complaint against Country Cable Systems ("Country Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. § 535. Greater Dayton requests that the Commission order Country Cable to carry WPTD-TV on Country Cable's cable system serving Greens Fork, Indiana, and that WPTD-TV be carried on Channel 16.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. §76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. §535(g)(4).

3. Greater Dayton contends that WPTD-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Country Cable's Greens Fork, Indiana, cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTD-TV: WPTD-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Dayton, Ohio, whose reference point, according to §76.53, is within 50 miles of the principal headend of Country Cable's Greens Fork, Indiana cable system. Accordingly, WPTD-TV meets the Commission's definition of a qualified local noncommercial educational television station. Greater Dayton has submitted a May 26, 1993 letter which it sent to Country Cable requesting carriage on Channel 16. According to Greater Dayton, Country Cable has neither commenced carriage nor responded in any way to Greater Dayton's request for carriage, nor has Country Cable submitted to Greater Dayton its channel lineup for the Greens Fork system.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because Greater Dayton has elected that WPTD-TV be carried on its over-the-air channel, Channel 16, we will grant its request that the Commission order Country Cable to carry WPTD-TV on Channel 16.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTD-TV, Dayton, Ohio (CSR-3945-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. §535). Furthermore, Country Cable Systems IS ORDERED to commence carriage of WPTD-TV on Channel 16 within forty-six (46) days from the release date of this *Order* on its system serving Greens Fork, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Douglas Cable Communications — CSR-3957-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: December 14, 1993

By the Chief, Mass Media Bureau:

1. On July 8, 1993, Central Missouri State University ("CMSU"), licensee of KMOS-TV, Sedalia, Missouri, filed a complaint against Douglas Cable Communications ("Douglas Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. §535. CMSU requests that the Commission order Douglas Cable to carry KMOS-TV on Douglas Cable's cable system serving Malta Bend, Missouri, and that KMOS-TV be carried on Channel 6.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station whose Grade B service contour encompasses the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(2).

3. CMSU contends that KMOS-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Douglas Cable's Malta Bend, Missouri, cable system. We agree. CMSU has presented the following evidence with respect to KMOS-TV: KMOS-TV is licensed as a noncommercial television station; it is owned by the Board of Regents at Central Missouri State University, a public agency operating under the laws of the state of Missouri; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; its Grade B service contour encompasses the entire municipality of Malta Bend. CMSU states that Douglas Cable has not responded to CMSU's request for the geographic location of the principal headend of Douglas Cable's Malta Bend cable system, but that CMSU "infer[s] that the headend is located at or near Malta Bend, the location of which is within KMOS-TV's Grade-B broadcast area." Accordingly, KMOS-TV meets the Commission's definition of a qualified local noncommercial educational television station. CMSU has submitted a November 25, 1992 letter which it sent to Douglas Cable requesting carriage on Channel 6. According to CMSU, Douglas Cable has neither commenced carriage nor responded in any way to CMSU's request for carriage and channel positioning.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because CMSU has elected that KMOS-TV be carried on its over-the-air channel, Channel 6, we will grant its request that the Commission order Douglas Cable to carry KMOS-TV on Channel 6.

5. In view of the above, the complaint filed on July 8, 1993 by Central Missouri State University, licensee of KMOS-TV, Sedalia, Missouri (CSR-3957-M) IS GRANTED, in accordance with § 615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. §535). Furthermore, Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on Channel 6 within forty-six (46) days from the release date of this *Order* on its system serving Malta Bend, Missouri. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton Public Television against Country Cable Systems — CSR-3943-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: December 14, 1993

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTO-TV, Oxford, Ohio, filed a complaint against Country Cable Systems ("Country Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. §535. Greater Dayton requests that the Commission order Country Cable to carry WPTO-TV on Country Cable's cable system serving Glenwood, Indiana, and that WPTO-TV be carried on Channel 14.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. §76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. §535(g)(4).

3. Greater Dayton contends that WPTO-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Country Cable's Glenwood, Indiana, cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTO-TV: WPTO-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Oxford, Ohio, whose reference point, according to §76.53, is within 50 miles of the principal headend of Country Cable's Glenwood, Indiana cable system. Accordingly, WPTO-TV meets the Commission's definition of a qualified local noncommercial educational television station. Greater Dayton has submitted a May 26, 1993 letter which it sent to Country Cable requesting carriage on Channel 14. According to Greater Dayton, Country Cable has neither commenced carriage nor responded in any way to Greater Dayton's request for carriage, nor has Country Cable submitted to Greater Dayton its channel lineup for the Glenwood system.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because Greater Dayton has elected that WPTO-TV be carried on its over-the-air channel, Channel 14, we will grant its request that the Commission order Country Cable to carry WPTO-TV on Channel 14.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTO-TV, Oxford, Ohio (CSR-3943-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. § 535). Furthermore, Country Cable Systems IS ORDERED to commence carriage of WPTO-TV on Channel 14 within forty-six (46) days from the release date of this *Order* on its system serving Glenwood, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Douglas Cable Communications — CSR-3959-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: December 14, 1993

By the Chief, Mass Media Bureau:

1. On July 8, 1993, Central Missouri State University ("CMSU"), licensee of KMOS-TV, Sedalia, Missouri, filed a complaint against Douglas Cable Communications ("Douglas Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. § 535. CMSU requests that the Commission order Douglas Cable to carry KMOS-TV on Douglas Cable's cable system serving Blackwater, Missouri, and that KMOS-TV be carried on Channel 6.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. § 535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. § 535(l)(1)(A); 47 C.F.R. § 76.55(a)(1). A qualified noncommercial educational television station whose Grade B service contour encompasses the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. § 76.55(b)(2).

3. CMSU contends that KMOS-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Douglas Cable's Blackwater, Missouri, cable system. We agree. CMSU has presented the following evidence with respect to KMOS-TV: KMOS-TV is licensed as a noncommercial television station; it is owned by the Board of Regents at Central Missouri State University, a public agency operating under the laws of the state of Missouri; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; its Grade B service contour encompasses the entire municipality of Blackwater, Missouri. CMSU states that Douglas Cable has not responded to CMSU's request for the geographic location of the principal headend of Douglas Cable's Blackwater cable system, but that CMSU "infer[s] that the headend is located at or near Blackwater, the location of which is within KMOS-TV's Grade-B broadcast area." Accordingly, KMOS-TV meets the Commission's definition of a qualified local noncommercial educational television station. CMSU has submitted a November 25, 1992 letter which it sent to Douglas Cable requesting carriage on Channel 6. According to CMSU, Douglas Cable has neither commenced carriage nor responded in any way to CMSU's request for carriage and channel positioning.

4. According to § 615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because CMSU has elected that KMOS-TV be carried on its over-the-air channel, Channel 6, we will grant its request that the Commission order Douglas Cable to carry KMOS-TV on Channel 6.

5. In view of the above, the complaint filed on July 8, 1993 by Central Missouri State University, licensee of KMOS-TV, Sedalia, Missouri (CSR-3959-M) IS GRANTED, in accordance with § 615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. § 535). Furthermore, Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on Channel 6 within forty-six (46) days from the release date of this *Order* on its system serving Blackwater, Missouri. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Amendment of Section 1.423
of the Commission's Rules

ORDER

Adopted: November 19, 1993; Released: December 14, 1993

By the Commission:

1. We are amending section 1.423 of the Commission's Rules, 47 C.F.R. § 1.423, to delete its provision that, in rulemaking proceedings, the Commission will notify parties by mail of the time, place and nature of oral arguments, hearings or such other proceedings that the Commission deems warranted. Notice of any such proceedings will continue to be published in the Federal Register, as required by the Administrative Procedure Act, 5 U.S.C. § 553(b).

2. Because the amendment adopted herein is a matter of agency organization, procedure or practice, the notice and comment and effective date provisions of the Administrative Procedure Act are not applicable. 5 U.S.C. §§ 553(b)(A),(d).

3. Accordingly, IT IS ORDERED, That section 1.423 of the Commission's Rules, 47 C.F.R. § 1.423, IS AMENDED as set forth in the Appendix below, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

RULE CHANGE

Part 1 of Title 47 of the CFR is amended as follows:

1. The authority citation for part 1 continues to read:

Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

Part 1 - Practice and Procedure

2. Section 1.423 is revised to read as follows:

§ 1.423 Oral argument and other proceedings.

In any rulemaking where the Commission determines that an oral argument, hearing or any other type of proceeding is warranted, notice of the time, place and nature of such proceeding will be published in the Federal Register.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-39

In the Matter of

Amendment of Parts 80, 87 and 94 of the Commission's Rules Governing the Private Radio Services.

REPORT AND ORDER

Adopted: November 19, 1993; Released: December 14, 1993

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Parts 80, 87 and 94 of the Commission's Rules to extend the terms of ship and aircraft station licenses from five years to ten years and to eliminate certain record keeping requirements in the Private Operational Fixed Microwave Service. The new rules will save the public time and money in the licensing process and reduce the regulatory burden on these fixed microwave licensees.

II. BACKGROUND/DISCUSSION

2. The Commission's Rules provide that licenses for stations in the Maritime and Aviation Services will normally be granted for terms of five years from the date of issuance, major modification, or renewal.[1] The Communications Act of 1934, as amended (Communications Act), however, permits license terms of up to ten years.[2] The Commission's Rules also require licensees of stations in the Private Operational Fixed Microwave Service to measure the carrier frequency, power delivered by the transmitter to the antenna, and effective radiated power (ERP) for each station and to maintain records of these measurements.[3]

3. In a *Notice of Proposed Rule Making* (*Notice*), 8 FCC Rcd 2153 (1993), we proposed to amend Parts 80, 87 and 94 of our rules to extend the terms of aircraft and ship station licenses from five years to ten years. As we pointed out in the *Notice*, the Communications Act permits license terms up to ten years. Requiring that licenses be renewed every five years increases the paperwork burden on the public who must fill out and submit the forms. A ten-year license term in these services eliminates unnecessary paperwork for the Commission as well as the public and thus would improve the efficiency of the Commission's license processing operations. The Aircraft Owners and Pilots Association (AOPA), an organization of owners and pilots of general aviation aircraft, supports this proposal, stating that the "current five year renewal requirement only generates unnecessary paperwork and expense for both aircraft owners and the Federal Communications Commission."[4] Accordingly, we are extending the terms of ship and aircraft station licenses to ten years from initial issuance, major modification or renewal for applications received after the effective date of this *Report and Order*.

4. We also proposed in the *Notice* to eliminate the requirements contained in Section 94.85 of the Rules[5] that licensees have to measure the carrier frequency tolerance, the power delivered by the transmitter to the antenna, and the ERP for stations in the Private Operational Fixed Microwave Service when the transmitter is initially installed or a change is made to the transmitter that could affect these values.[6] The requirements for carrier frequency tolerance, power delivered to the antenna, and ERP are specified in the rules[7] and in the station authorization. They must be adhered to at all times. There is little benefit to be had from requiring measurements at specified times, because the licensee is responsible for proper performance of its transmitters at all times. These measurements will not protect the licensee from Commission action if the licensee's transmitter is operating outside authorized limits, and it remains the responsibility of the licensee to ensure that its operating parameters remain within limits. In its comments, PacTel Paging "completely supports the Commission's [*Notice*]."[8] As these requirements can be eliminated without any change to the responsibilities of licensees or any detriment to the public interest, we are eliminating them.

5. Finally, we proposed in the *Notice* to eliminate certain record keeping requirements for Private Operational Fixed Microwave Service licensees, contained in Sections 94.113(a),(b),(d),(e),(f) and (g) of the Rules.[9] These sections require licensees to keep records of the measurements required by Section 94.85 (discussed in paragraph 4 above) and records of service or maintenance that may affect the proper operation of the transmitter.[10]

6. Again, PacTel Paging supports this proposal. We find these records to be of little use, as a licensee is subject to Commission action when its station exceeds the limits imposed by the rules and the terms of the station license, regardless of the controls employed or records kept. We are therefore eliminating these record keeping requirements. The remaining paragraph in Section 94.113 requires record

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1 47 C.F.R. §§ 80.25 and 87.27.9

2 47 U.S.C. § 307(c)..

3 *See* 47 C.F.R. §§ 94.85 and 94.113.

4 Letter from Aircraft Owners and Pilots Association to the FCC (April 22, 1993). AOPA also suggests that, due to the reduction in excessive paperwork, we should reduce the $35.00 application fee for aircraft station licenses. The $35.00 application processing fee is set by Congress and, therefore, cannot be reduced by the Commission. *See* 47 U.S.C. § 158(g).

5 *See* 8 FCC Rcd. 2153 (1993).

6 47 C.F.R. § 94.85.

7 *See* 47 C.F.R. §§ 94.67 and 94.73.

8 PacTel Paging, Comments of PacTel Paging at 1 (May 14, 1993).

9 *See* 8 FCC Rcd. 2153 (1993).

10 *See* 47 C.F.R. § 94.113.

keeping on antenna lighting.[11] As this is a matter of aviation safety, it is in the public interest to maintain these requirements.

III. CONCLUSION

7. Accordingly, we are amending Parts 80 and 87 of the Rules to extend the terms of ship and aircraft station licenses from five years to ten years. We are also amending Part 94 of the Rules to eliminate unnecessary measuring and record keeping requirements in the Private Operational Fixed Microwave Service. These actions will save time, effort and money for both licensees and the Commission, while having no negative impact on the public safety or efficiency of communications.

IV. FINAL REGULATORY ANALYSIS

8. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This *Report and Order* reviews the terms of aircraft and ship station licenses and certain measurement and record keeping requirements in the Private Operational Fixed Microwave Service. Lengthening the license terms and eliminating some measurement and record keeping requirements will reduce time, money and effort spent by the public and the Commission without a negative regulatory impact.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

No significant alternative to this action was contained in the *Notice* or suggested by commenters. The action represents the best means to achieve the regulatory objective of minimizing the regulatory burden on the public.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 303(r), and 307(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 307(c), Parts 80, 87 and 94 of the Commission's Rules, 47 C.F.R. Parts 80, 87, 94, ARE AMENDED as set forth below.

10. IT IS FURTHER ORDERED that this *Report and Order* will be effective thirty days after publication in the Federal Register.

11. For further information contact Sean White, Private Radio Bureau, Special Services Division, Aviation & Marine Branch, telephone (202) 632-7175, mail stop 1700C2.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FINAL RULE

Part 80 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 80 STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.25 is amended by redesignating paragraphs (a) and (b) as (b) and (c), respectively, by adding new paragraph (a), and revising newly redesignated paragraph (b) to read as follows:

§ 80.25 License term.

(a) Licenses for ship stations in the maritime services will normally be issued for a term of ten years from the date of original issuance, major modification, or renewal.

(b) Licenses other than ship stations in the maritime services will normally be issued for a term of five years from the date of original issuance, major modification, or renewal.

* * * * *

Part 87 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 87 AVIATION SERVICES

1. The authority citation for Part 87 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.27 is amended by redesignating existing paragraphs (a) and (b) as (b) and (c), respectively, adding a new paragraph (a), and revising newly designated paragraph (b) to read as follows:

§ 87.27 License term.

(a) Licenses for aircraft stations will normally be issued for a term of ten years from the date of original issuance, major modification or renewal.

(b) Licenses other than aircraft stations in the aviation services will ' normally be issued for a term of five years from the date of original issuance, major modification, or renewal.

[11] *See* 47 C.F.R. § 94.113(c).

* * * * *

Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 94 - Private operational-fixed microwave service

1. The authority citation for Part 94 is revised to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.85 is removed in its entirety.

3. Section 94.113 is revised to read as follows:

§ 94.113 Station records.

When a station in this service has an antenna structure which is required to be illuminated, appropriate entries in its station records (logs) shall be made as follows:

(a) The time the tower lights are turned on and off each day, if manually controlled.

(b) The time the daily check of proper operation of the tower lights was made, if an automatic alarm system is not employed.

(c) In the event of any observed or otherwise known failure of a tower light:

(1) Nature of such failure.

(2) Date and time the failure was observed or otherwise noted.

(3) Date, time, and nature of the adjustments, repairs, or replacements made.

(4) Identification of Flight Service Station (Federal Aviation Administration) notified of the failure of any code or rotating beacon light not corrected within 30 minutes, and the date and time such notice was given.

(5) Date and time notice was given to the Flight Service Station (Federal Aviation Administration) that the required illumination was resumed.

(d) Upon completion of the 3-month periodic inspection required by § 94.111(c):

(1) The date of the inspection and the condition of all tower lights and associated tower lighting control devices, indicators, and alarm systems.

(2) Any adjustments, replacements, or repairs made to insure compliance with the lighting requirements and the date such adjustments, replacements, or repairs were made.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BPET-811118KF

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

Order to Show Cause Why the Permit for KEEF-TV Should Not Be Revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BLET-870225KE

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BMPCT-870610KU

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BLET-870610KT

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For Special Temporary Authority

MEMORANDUM OPINION AND ORDER

Adopted: November 29, 1993; Released: December 14, 1993

By the Commission:

1. In *Decision*, 8 FCC Rcd 4192 (1993), we upheld the *Initial Decision* (*I.D.*) of Administrative Law Judge Joseph Chachkin (ALJ), which revoked the permit of Black Television Workshop (BTW) to construct a non-commercial UHF television station to serve the Los Angeles, California area.[1] By this action we deny Petitions for Reconsideration of the *Decision* filed on behalf of Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum (the "Wade Group") and on behalf of Mary V. Woodfork ("Woodfork").[2] By this action we also deny the Wade Group's Petition to Dismiss Woodfork as a party to this proceeding and dismiss as moot its Petition to Dismiss

[1] 7 FCC Rcd 7819 (1992). We had previously ordered that Exceptions to the *I.D.* be submitted to the Commission, not the Review Board, in order to expedite the proceeding to the greatest extent possible consistent with due process. 7 FCC Rcd 2716, 2717 (1992).

[2] The Petitions for Reconsideration were filed on July 23, 1993. On August 2, 1993 Woodfork opposed the Wade Group's Petition for Reconsideration and the Mass Media Bureau (MMB) filed a Consolidated Opposition to both the Wade Group's and Woodfork's Petition. The Wade Group filed an Opposition to Woodfork's Petition for Reconsideration on August 5, 1993. Woodfork and the Wade Group filed Replies to the Oppositions on August 12. On August 30 the MMB filed a Motion for Leave to File a Response and a Response to the Wade Group's Reply, arguing that the Wade Group's Reply unfairly called for sanctions against the MMB for making "frivolous contentions." On September 9 the Wade Group opposed the MMB's Motion. In light of our resolution of this proceeding, we are denying the MMB's Motion for Leave to File a Response, noting, however, that the MMB's contention which provoked the Wade Group's attack is in fact legally correct. *See* note 6 *infra*.

Titilola Payne Parker, Clint Wilson, Roy Campanella, Jr., Gary Cordell, Linda Pate, and Jerome Duncan as parties to this proceeding.[3]

2. The Wade Group's Petition to Dismiss Woodfork argues that the *I.D.* in this matter disqualified Woodfork as a permittee of the proposed Los Angeles station because she "fraudulently signed" a BTW ownership report submitted to the Commission. The Wade Group contends that Woodfork failed to file an Exception to that portion of the *I.D.* and that the matter is therefore a "final non-appealable determination" requiring the dismissal of Woodfork as a party. There is no merit to this argument. Though Woodfork has not denied that, pursuant to directions from Booker Wade, BTW's attorney, she once signed a BTW ownership report in blank, that action was not solely responsible for her disqualification.[4] Nor can her failure to recant that single action in Exceptions serve now as grounds for her disqualification, especially in light of the fact that she clearly preserved her right to continue participating in this proceeding by filing extensive Exceptions to many other aspects of the *I.D.* and by filing the instant Petition for Reconsideration.

3. The *I.D.* also found all other members of BTW's original board unqualified to be Commission permittees of the Los Angeles allocation. The Wade Group has filed a separate Petition to Dismiss six of those members as parties to this proceeding. Unlike Woodfork, the named individuals have not exercised their rights to protest their disqualification at either the agency or judicial level. The *Decision* is therefore final as to their interests and the Wade Group's Petition to Dismiss them as parties is dismissed as moot.[5] [6]

4. We turn now to the Petitions for Reconsideration filed by Woodfork and the Wade Group. Woodfork's Petition is based on arguments that were presented in her Exceptions to the *I.D.* and have already been carefully considered by the Commission. Reconsideration will not be granted to debate those matters again. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).[7] In most instances, the Wade Group's arguments are also arguments that the Commission has already considered, and we will not do so again. *WWIZ, supra*, 37 FCC 685.[8] In two other instances, though the arguments are new, the

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[3] The Wade Group filed the Petition to Dismiss Woodfork on August 5, 1993, the MMB and Woodfork opposed the Petition on August 11 and August 12 respectively, and the Wade Group filed a Reply to the Oppositions on August 23, 1993. The Wade Group filed the Petition to Dismiss the other six named members of the original BTW board on August 23, 1993, the MMB opposed the Petition on August 30, 1993, and the Wade Group filed a Reply to the Opposition on September 9, 1993.

[4] Woodfork was disqualified for breaching her corporate duty to BTW by repeatedly permitting Wade to manipulate her. *I.D.* at 7834 ¶ 127. However, the *I.D.* places ultimate responsibility for the false ownership report to which the Wade Group now refers on Wade himself. Specifically, it states that, while Woodfork "indirectly participated in a fraud upon the Commission" by signing the blank form, Wade "ultimately must be held accountable for the misrepresentations made .... since Wade alone filed the Ownership Report containing information which he knew to be false." *I.D.* at 7832 ¶ 112.

[5] Pursuant to 47 U.S.C. § 402 and § 405 respectively, the six parties had the right to file a judicial appeal of the decision disqualifying them as permittees and revoking the BTW permit or to petition for reconsideration of the matter by the Commission within thirty days of public notice of the decision, or by July 23, 1993. In addition to their failure to exercise those rights, they failed to respond to the Wade Group's Petition to Dismiss.

[6] Nonetheless, and contrary to the Wade Group's arguments, the MMB correctly points out that all parties should have served a copy of their Petitions for Reconsideration on the six original directors, 47 C.F.R. § 1.211. Section 1.276(f) of the Commission's rules, cited by the Wade Group to excuse its failure, applies on its face to comparative application proceedings rather than revocation proceedings. In any event, it leaves the dismissal of parties under the circumstances described therein to the discretion of the Commission, not other parties. In light of the fact that the six named individuals have otherwise declined to exercise their rights in this proceeding, as described in note 5 *supra*, we conclude that the Wade Group's failure to serve copies of its Petition for Reconsideration on those individuals renders the Petition procedurally deficient but not, as the MMB argues, so flawed as to warrant no further consideration.

[7] The essence of Woodfork's argument is that she had no reason to doubt the integrity of Wade, a respected attorney and former assistant to an FCC Commissioner. She claims that she consistently tried to participate in BTW's affairs, that to the extent Wade took actions which could reasonably be interpreted as inappropriate vis-a-vis his legitimate role at BTW, she challenged him, and that, but for her efforts, Wade's misconduct would not have come to the attention of the Commission. Thus, she contends, she should be absolved from responsibility for the transfer of control of BTW, the BTW permit should be reinstated, and she should be declared the sole permittee, a result which would serve the public interest in several ways. These were the exact arguments raised in her Exceptions and rejected because of the clear record evidence that Woodfork's willingness to be manipulated by Wade, both before and after other BTW Directors recognized that his actions were not in BTW's best interest, facilitated Wade's take-over. *See, e.g., I.D.* at 7826 ¶ ¶ 52-54 and 7834 ¶ 130. Woodfork now argues that the Commission's assessment of her role is in "crucial disagreement" with and harsher than that of the ALJ. In fact, both the ALJ and Commission recognized that Woodfork is due credit for her actions in bringing the BTW matter before the Commission, but that she must bear responsibility for her failure to properly exercise the corporate authority with which she had been vested. *See, e.g., I.D.* at 2834 ¶ 131; *Decision* at 4198 ¶ 20 and 4200 ¶ 28. Woodfork's reliance on individual phrases from the *I.D.* and *Decision* does nothing to change this ultimate conclusion.

[8] For example, the Commission has already considered, *inter alia*, the Wade Group's arguments that the ALJ's decision wrongfully stripped BTW of its right to counsel (*Decision* at note 53); that no sanctions can be imposed against BTW because it was not named in the *Hearing Designation Order* (*Decision* at note 53); that the MMB engaged in unfair trial tactics because it failed to depose or call as witnesses certain individuals who would have confirmed the Wade Group's version of events and that the burden of proof and burden of proceeding with the evidence therefore fell unfairly on the Wade Group (*Decision* at note 19); that events occurring prior to grant of the BTW permit could not be properly considered in determining whether to revoke the BTW permit (*Decision* at 31); that the Commission cannot conclude that an unauthorized transfer of control of BTW occurred because it has no articulated policy concerning transfers of control of non-stock entities (*Decision* at ¶ 13); that the evidence fails to support the conclusion that there was an intent to deceive the Commission concerning the transfer of control of BTW (*Decision* at note 41); that May and Bynum are legitimate BTW directors (*Decision* at ¶ 12); that the evidence supports the conclusion that BTW by-laws existed as early as May 1984 (*Decision* at ¶ ¶ 16, 25); that the evidence fails to support the conclusion that various BTW filings at the

facts underlying the arguments were readily available when the Wade Group filed its Exceptions to the *I.D.*, and they provide no public interest basis for reconsideration. Therefore, those arguments, likewise, warrant no relief. *See* 47 C.F.R. 1.106 (c) (reconsideration will be granted on the basis of facts not previously presented to the Commission only if the facts relate to events that have occurred or circumstances that have changed since the last opportunity to present such matters or if the public interest requires consideration of the facts).[9]

5. As to the remaining Wade Group arguments, we conclude that they are without merit. Specifically, the Wade Group argues that the decision in this proceeding is in conflict with two other recent Commission decisions and that it is racially discriminatory. It contends that in *Dixie Broadcasting, Inc.*, 8 FCC Rcd 4386 (1993), and in *Fox Television Stations, Inc.*, 8 FCC Rcd 5341 (1993), the Commission applied more lenient standards to white broadcasters than it did in this proceeding, where several of the parties are black. [10] We note initially that *Dixie Broadcasting* is an ALJ's *Initial Decision*, not a Commission decision, and thus it is not binding Commission precedent. *Western Communications, Inc.*, 59 FCC 2d 1411, 1446 n.9 (1976), *citing Finalization of Initial Decision*, 20 RR 1411 (1961). In any event, the facts as set forth both in *Dixie Broadcasting* and *Fox Television* are completely different from those here, and for that reason -- not because of any reason related to race -- the results were different.[11] Thus the cited cases, like all other arguments raised by Woodfork and Wade, fail to demonstrate that reconsideration would be appropriate.[12]

6. ACCORDINGLY, IT IS ORDERED, That the July 23, 1993 Petition for Reconsideration filed on behalf of Mary V. Woodfork IS DENIED.

7. IT IS FURTHER ORDERED, That the July 23, 1993 Petition for Reconsideration filed on behalf of Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

8. IT IS FURTHER ORDERED, That the Mass Media Bureau's August 30, 1993 Motion for Leave to File a Response to the Wade Group's Reply to Oppositions to the Petition for Reconsideration IS DENIED.

9. IT IS FURTHER ORDERED, That the Wade Group's August 5, 1993 Petition to Dismiss Mary V. Woodfork IS DENIED.

10. IT IS FURTHER ORDERED, That the Wade Group's August 23, 1993 Petition to Dismiss Titilola Payne Parker, Clint Wilson, Roy Campanella, Jr., Gary Cordell, Linda Pate, and Jerome Duncan IS DISMISSED as moot.

11. IT IS FURTHER ORDERED, That the Motion to Dismiss filed November 8, 1993 by the Mass Media Bureau IS DISMISSED as moot.

Commission contained misrepresentations and/or lacked candor (*Decision* at ¶ ¶ 21-26); that the testimony of various witnesses must be disregarded because it was biased or inconsistent (*Decision* at ¶ 14); that the evidence fails to support the conclusion that certain documents were fabricated (*Decision* at ¶ 24); that the conclusion that certain other BTW documents should have been filed with the Commission and were not is erroneous (*Decision* at n.50); and that Wade had no motive to control BTW and in fact did not control BTW except to the extent permitted by his roles as officer and director, positions to which he was legitimately elected (*Decision* at ¶ ¶ 14-20, 24).

[9] The Wade Group argues that the *Hearing Designation Order* (*HDO*) was too general to be legally sufficient and that, pursuant to the statute of limitations, consideration should be barred of any alleged misconduct except that which occurred during the one year preceding the issuance of the *HDO*. The Wade Group has been on notice as to both of these arguments since 1988, when the *HDO* was issued, but it failed to raise either of them in its exceptions to the Initial Decision. We do not believe that the public interest would be served by considering them for the first time now, especially considering the lengthy history of this proceeding and our earlier determination that it must now be expedited. *See* 47 C.F.R. § 1.277(a) and note 1, *supra*. However, concerning the statute of limitations argument, we note that 47 U.S.C. § 503 (b)(6)(B), cited as authority for the proposition that revocation should not be based on conduct occurring more than one year before issuance of the *HDO*, is inapposite in this proceeding. Revocation proceedings are governed by 47 U.S.C. § 312, which does not include a statute of limitations provision. *New West Broadcasting Systems, Inc.*, 8 FCC Rcd 102 (MMB 1993), also cited by the Wade Group in support of its contention, is likewise inapposite, since that case concerned imposition of a monetary forfeiture, not revocation.

[10] The Wade Group makes the related argument that the Commission's conclusion that Rosa Ware, one member of the Wade Group, did not act independently from her brother Booker Wade, another member of the Group, raises questions of gender and racial stereotyping because it assumes a black female is readily manipulated. However, the record overwhelmingly and objectively supports the conclusion that Ware was under Wade's control. *Decision* at ¶ 20.

[11] Specifically, though in *Dixie Broadcasting* the ALJ held that the licensee's misconduct was "serious," the ALJ found no "deliberate intent to mislead or deceive the Commission." *Dixie Broadcasting* at 4403 ¶ 127. Likewise, in *Fox Broadcasting*, though representations made to the Commission were found to be "potentially misleading and "intemperate," they were "technically accurate" and "did not materially distort the facts." 8 FCC Rcd at 5356 ¶ ¶ 67-70. Here, on the other hand, we agreed with the ALJ that "the record was replete" with evidence of misrepresentations and lack of candor, *Decision* at ¶ 25, and the Wade Group's arguments that the relevant information was submitted to the Commission in good faith was contradicted repeatedly. Further, members of the Wade Group, unlike the permittee in *Dixie Broadcasting*, not only failed to cooperate in the investigation and hearing, but also made considerable effort to defeat it. *See Decision* at note 20.

[12] On November 1, 1993 The National Association of Black Owned Broadcasters, Inc. (NABOB), filed Comments urging that the interests of the Los Angeles African American community in a minority controlled public television station warrant a result here like that reached in *Silver Star Communications-Albany, Inc.*, 6 FCC Rcd 6905 (1991), where a $20,000 forfeiture was imposed on the licensee. NABOB has not shown an interest in this proceeding to support a claim of standing. See *Coalition for the Preservation of Hispanic Broadcasting* v. *FCC*, 931 F.2d 73 (D.C. Cir. 1991) (en banc), cert. denied 112 S. Ct. 298 (1991). In any event, in contrast to the present proceeding, *Silver Star* was a case in which there was no finding of deception on the part of the licensee. In light of this determination, the MMB's November 8, 1993 Motion to Dismiss NABOB's Comments, its November 22, 1993 Erratum and the Wade Group's Opposition are moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Utilities, Inc. and
Bettles Telephone Co., Inc.

Petition for Waiver of Section
69.605(c) of the Commission's
Rules

REPORT AND ORDER

Adopted: November 29, 1993; Released: December 13, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Commission's rules permit certain local exchange carriers (LECs) to receive compensation for the use of their facilities in originating and terminating interstate calls on the basis of schedules that approximate average costs (the "average schedules") rather than on the basis of their own costs. "Average schedule companies" are defined in the Commission's rules as telephone companies that were "participating in average schedule settlements on December 1, 1982."[1] The Commission's rules permit average schedule LECs to convert to "cost" status (and receive settlements based on their actual costs), but do not permit cost companies to convert to average schedule status, absent a waiver.[2]

2. On April 13, 1993, National Utilities, Inc. (NUI) and Bettles Telephone Co., Inc. (Bettles) filed a petition for waiver, requesting permission to convert back to average schedule status effective January 1, 1994.[3] NECA, United States Telephone Association (USTA), and National Telephone Cooperative Association (NTCA) filed comments in support of the petition.[4] No party objected to NUI/Bettles's waiver request.[5] In this Order, we find that NUI and Bettles have shown good cause for a waiver of Section 69.605(c) of the Commission's rules, and therefore grant the requested waiver.

II. THE PLEADINGS

3. According to the petition, NUI converted from interstate average schedule status to cost-based settlements on January 1, 1991, and Bettles converted to cost-based settlements on July 1, 1991.[6] The companies state that they had been reluctant to convert to cost-based interstate settlements, but the level of payments under the interstate average schedules, coupled with the termination of certain interstate transition payments, were causing significant economic disruption for the companies. The companies argue that a waiver allowing their return to average schedule status is justified because of a recent change in Alaska Public Utilities Commission's (APUC) regulations. According to the companies, in the past, an Alaskan company could be a cost basis company on the federal side, but receive average schedule treatment on the state side. These companies state, however, that the APUC recently changed its regulations and only average schedule companies on the federal side will be entitled to average schedule treatment on the state side. The companies state that, absent a waiver, these new regulations will require them to undertake both federal and state cost studies and to participate in annual state rate proceedings.

4. NUI and Bettles argue that the APUC regulation will impose significant expense and burdens that would not have existed if the companies had remained interstate average schedule companies.[7] NUI and Bettles contend that it would be more cost effective for them to return to average schedule settlements.[8] The companies state that the revised average schedules now more closely simulate actual cost company settlements, because they employ new costing methods and provide settlements for new technologies. In addition, the petitioners believe that the loss of revenue from the interstate pool would be offset by the elimination of administrative costs associated with conducting both interstate and intrastate cost studies and participating in state rate cases.

5. All commenters support the NUI/Bettles waiver request. NECA, NTCA, and USTA argue that granting the waiver request would reduce administrative expenses and be in the public interest.[9] NECA contends that the effect of the waiver on NECA's pools would be *de minimis*, and that granting the waiver would impose no significant administrative burdens on NECA.[10] Finally, USTA adds that granting the waiver would be consistent with FCC policies because no financial windfall will result from NUI/Bettles' conversion from cost status. Both companies would receive less from the NECA pool under the average schedules than they would on the basis of cost studies.[11]

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[1] 47 C.F.R. §§69.605(c), 69.606 (1991).

[2] *See, e.g.*, MTS/WATS Market Structure, Report and Order, 103 FCC 2d 1017, 1026 (1986); NECA Pool Administration Procedures: Average Schedule Company (July, 1991) at 3.9.; MTS and WATS Market Structure: Average Schedule Companies, Memorandum Opinion and Order, 3 FCC Rcd 834, 840, 842 n.88 (1986).

[3] National Utilities, Inc. and Bettles Telephone Co., Inc. Petition for Waiver, filed April 13, 1993 (hereinafter, "NUI/Bettles petition"). NUI and Bettles are small local exchange carriers operating in Alaska. NUI serves 2,350 access lines from eleven exchanges, and Bettles has one exchange serving 50 access lines.

[4] Reply Comments were filed by NUI/Bettles.

[5] Several commenters request that we promulgate a rule of general application to permit small local exchange carriers to convert, in limited circumstances, from cost to average schedule status. *See* NECA Comments at 2; NUI/Bettles Reply Comments 4-5; USTA Comments at 7, n.12. These commenters raise issues that are beyond the scope of this proceeding, which concerns the specific waiver request of NUI and Bettles. The Commission has before it a petition for rulemaking filed by NECA requesting that local exchange carriers with fewer than 10,000 access lines who currently settle on a cost basis be allowed to convert to average schedule status at four-year intervals. *See NECA's Petition for Rulemaking*, Report No. 1975 (released Oct. 1, 1993).

[6] *See* NUI/Bettles Petition at 5, n.11.

[7] *Id.* at 5.

[8] *Id.* at 7-10.

[9] *See* NECA Comments at 2; NTCA Comments at 1; USTA Comments at 6-7.

[10] NECA Comments at 2.

[11] USTA Comments at 5-6.

III. DISCUSSION

6. The Commission has permitted cost companies to convert to average schedule status under limited circumstances.[12] Such waivers have been granted infrequently because of the potential that exists for carriers to inflate revenue requirements artificially. However, under the special limited circumstances of this case, a waiver is in the public interest.[13]

7. Average schedule status has certain advantages for small telephone companies and for interstate ratepayers. Average schedule companies are able to avoid certain administrative burdens, and interstate ratepayers are not required to pay the expenses that exchange carriers incur in performing interstate cost studies. In addition, average schedule companies have every incentive to lower costs to the greatest extent possible, because the more an average schedule company can reduce costs, the greater the return it will earn for its shareholders.[14] However, the Commission has concluded that an unrestricted opportunity for cost companies to convert to average schedule status is likely to operate to the detriment of interstate ratepayers. As the Commission has noted, since average schedule companies can always convert to cost, there is a danger that:

> a cost company that receives sufficient depreciation will eventually find it profitable, *ceteris paribus*, to convert to the average schedules because of the concomitant reduction to its rate base. We do not believe that it would be sound to permit exchange carriers to receive the windfall that would result if they were permitted to elect to depreciate plant to the "cross over" point and then receive average schedule treatment.[15]

8. This case does not present the set of circumstances that led to imposition of the rule against conversion to average schedule status. Both NUI and Bettles' net plant accounts have been steadily increasing, and it does not appear that NUI/Bettles are attempting to achieve a financial windfall by switching to average schedule status after having reached the "cross over" point.[16]

9. In addition, NUI/Bettles have demonstrated with particularity that converting back to average schedule status would not have an adverse impact on interstate revenue requirements. In a showing uncontradicted in this record, NUI/Bettles state that conversion to average schedule status would in fact reduce interstate revenue requirements by $250,000 per year.[17] Moreover, NUI/Bettles estimate that they will save $106,000 per year ($56,000 interstate and $50,000 intrastate) in cost study expenses each year by not having to perform cost studies.[18]

10. We also agree with those parties that have argued that changed circumstances concerning the consequences of petitioners' federal regulatory status help justify this waiver request.[19] The APUC now permits only average schedule companies on the federal side to maintain average schedule status on the state side.

11. Based on the record compiled in this proceeding, NUI/Bettles have made an adequate showing that conversion back to average schedule status under the facts described herein represents a special circumstance justifying a waiver of Section 69.605(c) of the Commission's rules. Under these limited circumstances, such a waiver is in the public interest. As noted in the *New Castle Waiver Order*, any future request for waiver of Section 69.605(c), of similar or related nature, must be thoroughly documented, and must clearly demonstrate that interstate revenue requirements, tariffed rates, and settlements will not increase as a consequence of the requested action.[20]

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, the Petition of National Utilities Inc. and Bettles Telephone Co., Inc. for Waiver of Section 69.605(c) of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[12] *See, e.g.*, Papago Tribal Utility Authority, Memorandum Opinion and Order, 2 FCC Rcd 6631 (Com. Car. Bur. 1987)(*Papago Waiver Order*) (Native American tribe, without any experience in operating a telephone company or in complying with FCC cost study practice, was granted a waiver to operate, as an average schedule company, a small exchange area that was acquired without supporting records).

[13] The Commission's rules may be waived if there is "good cause" to do so. *See* 47 C.F.R. §1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *see also* Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[14] *See, e.g.*, NUI/Bettles petition at 9.

[15] *5,000 Lines Waiver Order* at 3960.

[16] The Commission prohibits cost companies from converting to average schedule status in order to prevent local exchange companies from possibly "gaming" the system by inflating revenue requirements through depreciation of plant to the "cross over" point and then converting to average schedule status when plant investment diminishes. However, in this case from 1991 to 1992, NUI's investment increased by 22% and Bettles increased by 146%. NUI/Bettles petition at 12-13. *See also* New Castle Telephone Company Petition for Waiver of Section 69.605(c) and the Definition of "Study Area" Contained in Part 36, Appendix-Glossary, of the Commission's Rules, Memorandum Opinion and Order, 7 FCC Rcd 2081, 2082-83 (Com. Car. Bur. 1992)(*New Castle Waiver Order*) (identification of additional mechanisms by which conversion could artificially inflate revenue requirements).

[17] NUI/Bettles Petition at 7-8.

[18] *Id.* at 10. These expenditures do not include the expenses that are associated with annual rate cases. *Id.*

[19] *See, e.g.*, NTCA Comments at 1-2; USTA Comments at 3-5.

[20] *See New Castle Waiver Order* at 2083.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-633

In Re Applications of

CENTRAL FLORIDA COMMUNICATIONS GROUP, INC. File No. BPH-880505MS

MICHELLE N. TERZYNSKI File No. BPH-880505PL

For a Construction Permit for a
New FM Station on Channel 277A,
Holly Hill, Florida

ORDER

Adopted: November 29, 1993; Released: December 13, 1993

By the Commission:

1. Now before the Commission is an application for review[1] filed on July 19, 1993, by Central Florida Communications Group, Inc. (CFCG) of the Review Board's Decision, 8 FCC Rcd 4128 (Rev. Bd. 1993), concluding that CFCG was financially unqualified and granting Michelle N. Terzynski's application for a Construction Permit for a new FM Station in Holly Hill, Florida.

2. Having reviewed the pleadings before us,[2] the Commission affirms the Board's decision and adopts the Board's analysis and conclusions as its own.

3. ACCORDINGLY, IT IS ORDERED That the Motion for Leave to File Reply to Opposition to Application for Review filed August 6, 1993, by Central Florida Communications Group, Inc. IS DENIED.

4. IT IS FURTHER ORDERED That the Application for Review filed July 19, 1993, by Central Florida Communications Group, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] The following additional pleadings were filed: (a) an Opposition filed August 2, 1993, by Michelle N. Terzinski (Terzinski); (b) a motion for leave to file reply to opposition to application for review filed August 6, 1993, by CFCG; (c) a reply to opposition to application for review filed August 6, 1993, by CFCG; (d) an erratum to its opposition filed August 13, 1993, by Terzinski; (e) an opposition to CFCG's motion for leave to file reply to oppostition to application for review filed August 13, 1993, by Terzinski, and (f) an erratum to its application for review filed August 19, 1993, by CFCG.

[2] We will deny CFCG's motion for leave to file a reply to Terzinski's opposition because 47 C.F.R. § 1.115(d) states that "Replies to oppositions to applications for review of final decisions of the Review Board may be filed only if the Commission requests a reply," and none has been requested.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-380

In re Applications of

RIO GRANDE BROADCASTING CO.	File No. BPH-880815MV
ROBERTO PASSALACQUA	File No. BPH-880816NN
IRENE RODRIGUEZ DIAZ DE McCOMAS	File No. BPH-880816OR
UNITED BROADCASTERS COMPANY	File No. BPH-880816OW

For Construction Permit for a
New FM Station on Channel 247A
in Rio Grande, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1993; Released: December 13, 1993

By the Review Board: GREENE and BLUMENTHAL. Board Chairman MARINO absent.

1. The Review Board has under consideration a Petition for Reconsideration, filed October 1, 1993, by Roberto Passalacqua (Passalacqua), of the Board's *Decision*, 8 FCC Rcd 6256 (Rev. Bd. 1993). There, we denied Passalacqua's post-hearing petition for leave to amend specifying a new transmitter site and dismissed his application for want of a viable site. We had earlier found in our *Decision*, citing *Imagists*, 8 FCC Rcd 2763 (1993), that the presiding Administrative Law Judge (ALJ) had erroneously accepted a site amendment filed March 21, 1991 by Passalacqua; and thus, we did not have to consider whether Passalacqua had good cause later to amend from that site. *See Colorado Television, Inc.*, 98 FCC 2d 513, 518 n. 6 (Rev. Bd. 1984)(denial of first site amendment requires rejection of a second site amendment because "the chain of good cause had long been broken").[1] Our *Decision* also granted the application of United Broadcasters Company as the superior comparative applicant. In urging reinstatement of his application, Passalacqua primarily argues that waiting until 1991 to file an amendment did not warrant dismissal of his 1988 application. He also argues that the Board retroactively applied a new stricter standard against his application by relying on *Imagists*, which was released subsequent to the amendment. Passalacqua also renews arguments made in exceptions that two of United's principals are not entitled to integration credit. Responsive pleadings were filed by the opposing parties and Passalacqua filed a consolidated reply on November 2, 1993.

DISCUSSION

2. Reconsideration is appropriate only where the petitioner has shown "manifest error or omissions so material that their correction will result in substantial alteration of the original decision." *WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Thus, reconsideration "will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken." *Id.* Here, Passalacqua has not attempted to show that the Board committed manifest error in its application of Commission policy or precedent; rather he mainly reargues the result, an insufficient ground for reconsideration.[2] As for his contention that the Board retroactively applied a new standard to his amendment, he is mistaken. The Commission in *Imagists* did not materially revise the criteria for good cause showings. It simply clarified the degree of diligence it will now deem acceptable, urging applicants to submit curative amendments no later than thirty days after they learn, or should have learned, of the deficiency requiring an amendment. That clarification was not decisional concerning Passalacqua's amendment inasmuch as the amendment was filed more than one and one-half years after Passalacqua had been alerted to problems regarding his site proposal. Citing precedent pre-dating Passalacqua's amendment, the Commission noted in *Imagists* at ¶ 14 and n. 17 that a delay of more than six months has long been presumed to be excessive in the absence of unusual circumstances.[3] Providing no basis for departing from our previous *Decision*, Passalacqua's petition for reconsideration shall be denied.

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[1] In ¶ 13 of our *Decision*, the Board noted significant problems concerning Passalacqua's relationship with the site owner that would have vitiated any showing of good cause for the post-hearing amendment, had it been necessary to reach the merits of that question.

[2] Passalacqua does point out a misstatement contained in note 6 of our *Decision*. There, with respect to an earlier site amendment (*i.e.* October 17, 1990), we stated that Passalacqua did not claim to amend as of right. In his petition for leave to amend, Passalacqua included, along with a good cause showing, a claim that the amendment was filed as of right, but counsel for Passalacqua asked the ALJ to defer action on the petition pending a further amendment. When no amendment was filed, the ALJ denied the petition for leave to amend. *See* ¶ 5 of our *Decision*.

[3] Passalacqua filed both a motion for leave to supplement his petition for reconsideration, and the supplement, on October 8, 1993, reporting that the Commission, in *Nugget Broadcasting Co.*, 8 FCC Rcd 7121, 7123 n.11 (1993), commented on the applicability, under different circumstances, of its *Imagists* good cause discussion. The applicant in *Nugget* technically had failed to meet the thirty day filing period for reporting a deficiency, in apparent conflict with the admonishment in *Imagists*. The Commission, however, distinguished the situation in *Nugget* from that of *Imagists*, noting the amendment in the latter case had been filed more than 15 months after the applicant had learned of its deficiency. The Commission further observed that *Nugget* was not a case in which "an applicant [sat] idly by, either doing nothing or pursuing a course that was unlikely to resolve the problem expeditiously." Passalacqua seeks to identify himself with the applicant in *Nugget*, but the facts in this proceeding more closely resemble those found in *Imagists*.

3. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Supplement to Petition for Reconsideration, filed on October 8, 1993, by Roberto Passalacqua IS GRANTED; and his Petition for Reconsideration, filed on October 1, 1993, and supplemented on October 8, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-301

In re Applications of

Charles A. Farmer (hereafter "Farmer") File No. BPH-920518MA

Richard M. Schafbuch (hereafter "Schafbuch") File No. BPH-920521MI

For Construction Permit
for a New FM Station on Channel 280C3
in Ilwaco, Washington

HEARING DESIGNATION ORDER

Adopted: November 17, 1993; Released: December 14, 1993

By the Chief, Audio Services Division

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Farmer owns 100% of the common voting stock of Lower Columbia Broadcasting Company, Inc., licensee of station KKEE(FM), Longbeach, Washington. Farmer has indicated his intent to terminate his relationship with station KKEE(FM) in the event of grant of his application. Farmer will be required to sever all connections with station KVEE(FM), prior to the commencement of program test authority.

3. Farmer submitted amendments on July 27, 1992 and September 14, 1992. Both of these amendments were signed by counsel for Farmer, and not by Farmer himself, as required by 47 C.F.R. § 73.3513. Accordingly, these amendment are unacceptable for filing and will be returned.

4. In Section III, Financial Qualifications, of FCC From 301, Schafbuch identifies the entity for his source of funds, but fails to identify the contact person at the U.S. Bank of Oregon. Accordingly, Schafbuch will be required to file an amendment which gives this required information to the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications would be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of grant of Farmer's application, he will be ordered to divest himself of all interest in and sever all connections with station KKEE(FM), Longbeach, Washington, prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That the July 27, 1992 and September 14, 1992 amendments filed by Farmer ARE HEREBY RETRUNED.

10. IT IS FURTHER ORDERED, That Richard M. Schafbuch shall submit the amendment specified in paragraph 4 hereinabove to the presiding Administative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, that a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parities may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commissions, 2025 M Street, N.W., Suite 7212 Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.1221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c)(1) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in (a) the Standard Document Production Order (See Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute resulting in dismissal of the application. *See generally Proposals to Reform the Com-*

mission's Comparative Hearing Process (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration*, 6 FCC Rcd 3403, 3404 paras. & n.3, Appendix paras. 3 & 5, (released May 15, 1991).

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-300

In re Applications of

STEPHEN O. MEREDITH File No. BPH-920430MD
(hereafter "Meredith")
AL HAZELTON File No. BPH-920430ME
(hereafter "Hazelton")

For Construction Permit
for a New FM Station on Channel 243C1
in Audubon, Iowa

HEARING DESIGNATION ORDER

Adopted: November 22, 1993; Released: December 14, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Directional Antenna.* A review of the Hazelton application reveals that there is a discrepancy in the relative field pattern for the directional antenna. Specifically, in Exhibit E-3 of the application, the *plotted* relative field along the 310^0 and 350^0 radials is *0.990*. However, according to the tabulated pattern in Exhibit E-3, the relative field along the 310^0 and 350^0 radials is *0.950*. Since neither value would violate the Commission's Rules, this discrepancy constitutes neither a tenderability nor an acceptability defect. Accordingly, Hazelton shall submit an amendment correcting the discrepancy.

3. *EEO.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Hazelton has filed such statement, it is deficient. Hazelton has not listed any recruitment sources for women. Accordingly, Hazelton will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Hazelton shall submit the amendments specified in Paragraphs 2 and 3 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within

the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONFERENCE CALL
USA, INC.
Complainant,

v.

US SPRINT COMMUNICATIONS COMPANY, LP
Defendant.

File No. E-93-072

ORDER

Adopted: December 3, 1993; Released: December 14, 1993

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On March 15, 1993, Conference Call USA, Inc. filed a formal complaint against US Sprint Communications Company, LP (Sprint) alleging that Sprint had violated Sections 201, 202 and 203 of the Communications Act of 1934, as amended,[1] in connection with Sprint's request for an advance deposit prior to furnishing 800 service to the complainant. Sprint denied the allegations and moved to dismiss the complaint.[2] The parties have also engaged in discovery, including the exchange of interrogatories.[3] On October 13, 1993, Conference Call filed a motion to dismiss its complaint without prejudice. The motion is unopposed.

2. Conference Call does not state a basis for its motion nor does it present any grounds for its request that we dismiss the complaint without prejudice.[4] Shortly after the motion was filed, the staff contacted counsel for Conference Call and Sprint and advised them of our intention to dismiss the complaint with prejudice in the absence of a further showing by the complainant. No such showing has been made. Under the circumstances, we will dismiss the complaint with prejudice. It is clear that Conference Call has no interest in pursuing this matter at this time, and, given the procedural posture of the case,[5] it has provided no plausible basis for preserving the prospect of a future complaint filing based on the same operative facts and requests for relief contained in the instant complaint.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

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[1] 47 U.S.C. §§ 201, 202, 203.

[2] Verified Answer of Sprint (filed May 3, 1993).

[3] Sprint's First Set of Interrogatories to Conference Call USA, Inc. (filed June 16, 1993); First Set of Interrogatories of Conference Call-USA, Inc. (filed June 16, 1993). On July 15, 1993, Sprint wrote counsel for Conference Call and informally objected to the number of interrogatories served on Sprint. Sprint claimed that Conference Call had violated the Commission's rules by serving 62 interrogatories, well in excess of the 30 interrogatories allowed by Section 1.729(a) of the rules, 47 C.F.R. § 1.729(a). Letter from M. Fingerhut, General Attorney, Sprint to C. Helein, Counsel for Conference Call USA, Inc. (dated July 15, 1993). Conference Call responded to Sprint's interrogatories on July 16, 1993. The deadline for motions to compel answers to interrogatories expired on August 2, 1993 with neither party filing a motion. The staff had scheduled a conference for October 14, 1993 to discuss the status of the proceeding. *See* Letter from Thomas D. Wyatt, Chief, Formal Complaints & Investigations Branch to M. Fingerhut and C. Helein (dated Oct. 6, 1993).

[4] *See* 47 C.F.R. § 1.727(a) (movant required to state with particularity the grounds and bases for its request).

[5] *See* note 3, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-85

In re Applications of

SUN OVER JUPITER BROADCASTING, INC.	File No. BPH-890913MG
TRIPLE J PROPERTIES, INC.	File No. BPH-890913MI
INTERMART BROADCASTING OF PALM BEACH, INC.	File No. BPH-890914MG
TERRY D. MOORE d/b/a PELICAN BROADCASTING	File No. BPH-890914MK
AFRO-AMERICAN BROADCASTERS LIMITED	File No. BPH-890914MS
MARILYN BIRK	File No. BPH-890914MV
LIGHTHOUSE BROADCASTING, INC.	File No. BPH-890914MZ
MANUEL PALAU	File No. BPH-890914NX
JUPITER RADIO BROADCASTING, INC.	File No. BPH-890914OE

For Construction Permit for a
New FM Station on Channel 288A
at Jupiter, Florida

ORDER

Adopted: December 8, 1993; Released: December 17, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. By *Memorandum Opinion and Order* (*MO&O*), FCC 93R-62, released November 24, 1993, the Review Board remanded this proceeding specifying abuse of process and misrepresentation issues against Afro-American Broadcasters Limited (Afro-American). On December 2, 1993, several of the parties -- Jupiter Radio Broadcasting, Inc., Triple J Properties, Inc., Sun Over Jupiter Broadcasting, Inc., Manuel Palau, and Intermart Broadcasting of Palm Beach, Inc. (collectively, movants) -- submitted to the Board a document styled "Joint Motion for Clarification and Modification of Remand Order" in which they request that the Board revisit the *MO&O* for purposes of: (1) issuing notice that Afro-American may be liable for a monetary forfeiture; and (2) expanding the scope of the issues specified against the applicant to include allegations first raised by Triple J in a January 10, 1992 petition to enlarge issues.

2. Our analysis of the joint motion reveals that it is essentially a petition for reconsideration of the *MO&O*. As such, it will be summarily dismissed as an unauthorized pleading in accordance with Commission rules. 47 CFR §§ 1.102(b)(2) ("Petitions for reconsideration of [non-final] interlocutory actions will not be entertained"), 1.291(c)(3) ("Petitions requesting reconsideration of an interlocutory ruling made by . . . the Review Board . . . will not be entertained); *see also REM Malloy Broadcasting*, 6 FCC Rcd 6497 (Rev. Bd. 1991); *Roxanne Givens*, 5 FCC Rcd 7010 (Rev. Bd. 1990).[1]

3. Although we need not consider the merits of movants' procedurally infirm request, we nevertheless observe the following relative to their assertions. The Board properly refrained from commencing forfeiture proceedings against Afro-American because the conduct at the root of the qualifying issues occurred more than one year before the Board's action. *See* 47 U.S.C. 503(b)(6)(B) (no forfeiture penalty lies against an applicant where "the violation charged occurred more than 1 year prior to the date of issuance of the required notice"); 47 CFR § 1.80(c)(3) (same). As to the second matter raised by the movants, the *MO&O* set forth the Board's rationale for specifying the issues against Afro-American. Clarification and expansion of the scope of the issues must be sought from the ALJ in the first instance. *See Radio Delaware, Inc.*, 5 FCC Rcd 380 (Rev. Bd. 1990); *Alden Communications Corp.*, 103 FCC 2d 1, 2 (Rev. Bd. 1986).

4. ACCORDINGLY, IT IS ORDERED That the joint motion for clarification and modification filed by Jupiter Radio Broadcasting, Inc., Triple J Properties, Inc., Sun Over Jupiter Broadcasting, Inc., Manuel Palau, and Intermart Broadcasting of Palm Beach, Inc. on December 2, 1993, IS DISMISSED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[1] Movants' reference to Section 1.301(b) is unhelpful as that provision applies only to appeals from the rulings of Presiding Officers.

[2] In light of the procedural schedule governing the remand proceeding, *see Order*, FCC 93M-740, released Dec. 3, 1993, we are providing prepublication copies of this *Order* to the parties and the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

Robin L. Allen NAL/Acct.: 215FE0160
Port Angeles, Washington

Richard M. Smith
Chief, Field Operations Bureau

ORDER

Adopted: December 6, 1993; Released: Decemmber 15, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is in response to Robin L. Allen's letter requesting reconsideration of a Forfeiture Order issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), to Mr. Allen for willful violation of Section 80.207(a)(1); Section 80.359(a) and (b); and Section 80.373(f) of the Commission's Rules.

2. The monetary forfeiture penalty is cancelled.

II. BACKGROUND

3. On July 20, 1992, the Ferndale office issued a Notice of Apparent Liability for operating with an unauthorized emission on Marine Channel 70. A response to the Notice of Apparent Liability was received on August 21, 1992. Mr. Allen admitted he used Channel 70, but was using outdated information and he now knows Channel 70 is not to be used for voice communications. On August 27, 1992, the Ferndale office issued a $1,600 Notice of Forfeiture for using voice communications on Channel 70. Mr. Allen responded to the forfeiture order by stating that he feels the $1,600 fine is too much. He also says that he cannot afford to pay the amount and enclosed copies of his income statement and his monthly bill payments.

III. DISCUSSION AND CONCLUSION

4. Mr. Allen violated Section 80.207(a)(1); Section 80.359(a) and (b); and Section 80.373(f) of the Commission's Rules.

5. The Commission has, however, recently revisited its forfeiture policies. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on that reconsideration and the fact that this was a first offense with no prior record of violation, we are cancelling the forfeiture.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that the proposed monetary forfeiture to Robin L. Allen, IS CANCELLED.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-218

In the Matter of

Amendment of Section 76.51 of the Commission's Rules to Include Clearwater, Florida in the Tampa-St. Petersburg, Florida, Television Market — RM-4895

REPORT & ORDER
(Proceeding Terminated)

Adopted: December 6, 1993; Released: December 15, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is the *Notice of Proposed Rule Making* in MM Docket No. 93-218, 8 FCC Rcd 5069 (1993) ("*Notice*"), issued in response to a petition filed by Christian Television Corporation, Inc. ("CTC"), licensee of television station WCLF(TV), Channel 22 (Independent), Clearwater, Florida, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. Section 76.51, to add Clearwater as a designated community in the Tampa-St. Petersburg, Florida, television market. CTC filed comments in support of its proposal.

2. In the *Notice*, we tentatively concluded that a sufficient case for redesignation of the subject market had been set forth such that the proposal should be tested through the rulemaking process. We noted that the information before us in the petitioner's request indicated that WCLF and stations licensed to communities in the Tampa-St. Petersburg television market do compete for audiences and economic support throughout much of the combined market area, and that sufficient evidence had been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, we observed that the CTC proposal appeared to be consistent with the Commission's policies regarding redesignation of a hyphenated market.

3. For the reasons outlined in the *Notice*, we believe that amendment of Section 76.51 as requested by the petitioner is consistent with the procedures outlined in Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,[1] which amended Section 614(f) of the Communications Act of 1934, and will serve the public interest by meeting the underlying purposes of the market hyphenation rule to equalize competition among stations in genuine competition. *See, e.g., Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122 (1985).

4. Accordingly, pursuant to delegated authority,[2] IT IS ORDERED that, effective thirty (30) days after publication in the Federal Register, Section 76.51(a) of the Commission's Rules, Major Television Markets, IS AMENDED to include Clearwater, Florida, as follows:

Tampa-St. Petersburg-Clearwater, Florida.

5. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

6. For further information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Pub. L. No. 102-385, 106 Stat.1460 (1992).
[2] *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965, 2978, n.150 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Michael J. Jablinske — NAL/Acct. No: 215ST0012
All Seasons Charters
Seattle, Washington

ORDER

Adopted: December 3, 1993; Released: December 15, 1993

1. On July 20, 1992, a Notice of Apparent Liability for Monetary Forfeiture (NAL) was issued to Michael J. Jablinske in the amount of $8,000 for willful violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. §301.

2. On August 29, 1991, Mr. Jablinske had operated a CB radio, the transmitter of which had been modified and, thus, was no longer type accepted. Operation of a CB station with a non-type accepted transmitter voids the station authorization. See 47 C.F.R. §95.409.

3. In his response to the NAL, Mr. Jablinske claimed that no violation occurred and that the station was operated only within the CB band and especially on channel 29.

4. The operation of the non-type accepted transmitter constitutes a violation, even if it is operated on a CB frequency.

5. A Forfeiture Order was issued on August 19, 1992, in the amount of $8,000.

6. In his response to the Forfeiture Order, Mr. Jablinske states that the violation was not willful. The operation of the transmitter is a willful act sufficient to make the violation willful. The inspector observed Mr. Jablinske and one Pat Berglund operate the radio at 10:48 A.M. PST on what the channel selector of the transmitter indicated was CB channel 29 and communicate with their vessel, Wildcat. The inspector verified by measurement that the transmitter was modified to operate on unauthorized frequencies. Mr. Jablinske was informed of this and told that the transmitter could not be used unless it was restored to its original condition. Inexplicably, after being told this and in the presence of the inspector, Mr. Jablinske once again operated the radio, at 10:57 A.M. to communicate with vessel Wildcat. There are, furthermore, other facts in this case which indicate that Mr. Jablinske is less than candid in his denial of knowledge of modifications to his CB transmitter. 1) The non-standard switches on the transmitter were in full view; 2) he had previously, during the ship inspection that day, informed the inspector that his CB station had been "tuned up" to operate at 5 watts, in itself an unauthorized modification as CB transmitters are limited to 4 watts maximum output; and 3) upon being advised that the transmitter could not be operated in its existing state, Mr. Jablinske telephoned a local CB repair shop, known to the inspector as one which modifies CB transmitters to operate with excessive power or on non-CB frequencies, and spoke to two employees there on a first-name basis.

7. Mr. Jablinske makes mention of inability to pay the forfeiture, but has submitted no supporting documentation. This has not, therefore, been considered.

8. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Michael J. Jablinske dba All Season Charters pay a forfeiture of $8000 within 30 days of the release of this Order.

9. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215ST0012, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago,IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Carrier Radio Service NAL/ACCT: 315KI0012
Station KNKN 525

Texas #20 Rural Cellular, Inc.

ORDER

Adopted: December 3, 1993; Released: December 15, 1993

By the Field Operations Bureau:

1. The Field Operations Bureau, Federal Communications Commission (FCC), has before it a Request for Higher Level Review dated July 21, 1993, from counsel, on behalf of its client, Texas #20 Rural Cellular, Inc., licensee of Common Carrier Radio Service Station KNKN 525 (Texas #20). The request is accepted as a Petition for Reconsideration under Section 1.106 of the FCC's rules, 47 C.F.R. Section 1.106. Texas #20 seeks reconsideration of an $8,000 monetary forfeiture penalty issued to it by the FCC's Kingsville, Texas, Office in a Forfeiture Order released February 22, 1993. That order held that Texas #20 had violated Section 17.50 of the FCC's rules because it had failed to adequately paint an antenna tower structure on which it was licensed by the FCC near Alice, Texas, at 27 degrees 47' 58" North Latitude and 098 degrees 08' 08" West Latitude. See 47 C.F.R. Section 17.50. Texas #20 argues that it was not operating from this antenna tower structure at the time of the violation.

2. The above Forfeiture Order, NAL 315KI0012, is cancelled in accordance with Section 1.80(i) of the FCC's rules, 47 C.F.R. Section 1.80(i). The evidence indicates that Texas #20 was not operating any facilities on this tower when the violation occurred.

3. A copy of this Order shall be sent certified mail, return receipt requested, to Texas #20 Rural Cellular, Inc., 8410 West Bryn Mawr Ave., Chicago, IL 60631; and to Texas #20's attorney.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Software Electronics NAL/ACCT 215PO0018
Aloha, Oregon

ORDER

Adopted: December 6, 1993; Released: December 15, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Software Electronics (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's August 6, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302 (the Act). As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount of the forfeiture is $5,600.

II. BACKGROUND

3. On February 6, 1992, Software Electronics was offering for sale personal computer models 486-33, 386-33 and 386-25, all of which were uncertified personal computing devices.

4. On June 25, 1992, the Portland Office issued Software Electronics a Notice of Apparent Liability (NAL) for willful violation of Section 302(b) of the Communications Act and Section 2.803 of the FCC's Rules by offering for sale uncertified personal computing devices. Petitioner responded to the NAL on July 1, 1992. Upon review of the response, the Portland Office issued Software Electronics a Notice of Forfeiture for $7,000 on August 6, 1992.

5. Software Electronics states that the forfeiture should be dismissed because they immediately removed the computers from display after the FCC investigator's visit. Software has also requested a reduction in the amount of the forfeiture because of its relative inexperience in this type of business.

III. DISCUSSION AND CONCLUSION

6. Although the Commission considers whether or not prompt corrective action is taken in deciding to adjust a forfeiture amount upward, that type of action, however, does not excuse or mitigate liability. *See Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973). We, therefore, are unpersuaded by that argument. We note, however, that this Company has no previous history of violating Commission Rules, and we have reduced the amount of the forfeiture accordingly. We have also considered what appears to be an argument for mitigation in order to "survive in the market". The Commission is required to consider a subject's financial circumstances and overall ability to pay before assessing a forfeiture. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993) (*Policy Statement*). Petitioner, however, has not submitted any documentation that would support a further reduction on that basis.[1]

7. Petitioner has failed to raise any reasons justifying further reduction of the forfeiture amount. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments was taken into consideration. *See Policy Statement*. No further adjustments appear warranted.

8. For the reasons stated above, we have reduced the amount of the forfeiture to $5,600.

IV. ORDERING CLAUSES

9. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by Software Electronics is GRANTED in part and DENIED in part. 47 C.F.R. § 1.106.

10. IT IS FURTHER ORDERED that Software Electronics shall submit the $5,600 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place NAL number 215PO0018 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return-receipt requested, to Software Electronics, 1235 N.W. 185TH Avenue, Aloha, Oregon 97006.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Unlicensed Operation by Larry J. McCarty dba McDonalds #02029 Norfolk, Virginia — NAL/Acct. No. 315NF0019

ORDER

Adopted: December 6, 1993; Released: December 15, 1993

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Larry J. McCarty (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's May 12, 1993, action finding Petitioner liable for a monetary forfeiture in the amount of $8,000 (NAL Acct. No. 315NF0019). As explained below, we are cancelling the monetary forfeiture penalty.

II. BACKGROUND

2. On April 14, 1992, Petitioner's employees at his 7900 Shore Drive, Norfolk, Virginia, place of business were operating a wireless radio station in the land mobile service. Petitioner was using the unlicensed radio transmitter at his business establishment (a McDonalds restaurant) to relay fast food orders. In a Notice of Apparent Liability issued to Petitioner on November 23, 1992, we incorrectly notified Petitioner that he was apparently liable for unlicensed operation on 151.175 MHz. In the subsequent, May 12, 1993, Forfeiture Order, we cited the correct frequency that was used for the unlicensed transmissions, 154.600 MHz.

III. DISCUSSION AND CONCLUSION

3. Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), establishes content requirements for notices of apparent liability. Because the frequency 151.175 was cited in error, we do not think Petitioner received proper notice of the violation. For this reason, we are cancelling the forfeiture.

4. In view of the potential for interference posed by unlicensed radio transmission, the Commission views unlicensed operations as a serious matter warranting imposition of forfeiture and administrative penalties. Nevertheless, we believe that in this case a cancellation is necessary because of the deficient notice which was afforded Petitioner. For the aforementioned reasons, we are cancelling the forfeiture.

IV. ORDERING CLAUSES

5. IT IS ORDERED that the Forfeiture Order issued to Larry J. McMarty, dba McDonalds #02029, is hereby cancelled.

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Petitioner and Petitioner's counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION
WESTERN UNION
INTERNATIONAL, INC.,
AND TELECOM*USA, INC.,
Complainants,

v. File No. E-93-126
PACIFIC BELL,
Defendant.

ORDER

Adopted: December 2, 1993; Released: December 15, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 28, 1993, MCI Telecommunications Corporation, Western Union International, Inc., and Telecom*USA, Inc. filed the above-captioned complaint against Pacific Bell ("Defendant") seeking damages resulting from the Defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On November 9, 1993, however, the parties filed a joint motion to dismiss the complaint stating that they had settled all claims against Defendant in this proceeding and requesting that the complaint be dismissed with prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. 55-DSS-ML-93

Application for Modification of the TELSTAR 301 Domestic Fixed Satellite License

and

Application for Special Temporary Authority for the TELSTAR 301 Domestic Fixed-Satellite — File No. 56-DSS-STA-93

ORDER

Adopted: December 7, 1993; Released: December 16, 1993

By the Chief, Domestic Facilities Division:

1. American Telephone and Telegraph Company (AT&T) has filed an application for authority to operate the TELSTAR 301 in an inclined orbit mode. In addition, AT&T has requested a six month extension of the satellite's operating authority. Hughes Communications Galaxy, Inc. (Hughes) filed comments. AT&T filed a reply. For the reasons set forth below, AT&T's application for modification is granted.[1]

2. TELSTAR 301 was launched in July 1983 and commenced service in September 1983. It is operating at 96^0 W.L. TELSTAR 301 has been operating for ten years and its on-board stationkeeping fuel capacity is virtually depleted. AT&T's TELSTAR 401 satellite has been authorized to replace the TELSTAR 301.[2] AT&T anticipates that TELSTAR 401 will be launched in December 1993 and, after an eight week test period, will be placed into operation in February 1994. In order to continue to provide service to its TELSTAR 301 customers, AT&T has requested a 180-day extension of its license term and a modification of its license to operate the TELSTAR 301 satellite in an inclined orbit mode in order to prolong the operational life of TELSTAR 301 until TELSTAR 401 is operational.

3. In its comments, Hughes reminded AT&T of its obligation to move the TELSTAR 301 satellite to its assigned location of 97^0 W.L. upon the placement of a GALAXY satellite at 95^0 W.L. AT&T, in its reply, agreed to do so.

4. We will permit AT&T to operate TELSTAR 301 in an inclined orbit mode, thus extending the operational life of the satellite. In addition, we will modify the license term of TELSTAR 301 by extending operational authority an addition 180 days, until March 31, 1994. Grant of this modification will provide an opportunity for the public to continue receiving services from TELSTAR 301. Therefore, we find that, pursuant to 47 U.S.C. § 309, grant of these applications will serve the public interest, convenience and necessity.

ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Application File No. 55-DSS-ML-93 IS GRANTED and American Telephone and Telegraph Company IS AUTHORIZED to operate the TELSTAR 301 satellite in an inclined orbit mode.

6. IT IS FURTHER ORDERED that authority to operate the TELSTAR 301 satellite in an inclined orbit mode is subject to the following conditions:

(a) American Telephone and Telegraph Company shall periodically correct the satellite attitude to achieve a stationary spacecraft antenna pattern on the surface of the Earth and centered on the satellite's designated service area.

(b) American Telephone and Telegraph Company shall control all interference to adjacent satellites, as a result of operating in an inclined orbit, to levels not to exceed that which would be caused by the satellite network operating without an inclined orbit.

(c) American Telephone and Telegraph Company can not claim protection in excess of the protection that would be received by the satellite network operating without an inclined orbit.

(d) American Telephone and Telegraph Company shall continue to maintain the space station at the authorized longitude orbital location in the geostationary satellite arc with the appropriate east-west stationkeeping tolerance.

7. IT IS FURTHER ORDERED that American Telephone and Telegraph Company IS AUTHORIZED to operate its TELSTAR 301 satellite through March 31, 1994.

8. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] AT&T also filed a request for Special Temporary Authority (STA) to implement these modifications. In light of this action, AT&T's STA request is dismissed as moot.

[2] American Telephone and Telegraph Company, 3 FCC Rcd 6980 (1988) (authorization to construct, launch and operate TELSTAR 401).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY — File No. 57-DSS-STA-93

Application for Special Temporary Authority for the TELSTAR 401 Domestic Fixed-Satellite

Adopted: December 7, 1993 **Released: December 16, 1993**

By the Chief, Domestic Facilities Division:

1. American Telephone and Telegraph Company (AT&T) has requested special temporary authority to operate its TELSTAR 401 domestic fixed-satellite, assigned to 97^0 W.L., at 89^0 W.L. for an eight-week period to test the satellite, commencing upon launch. Hughes Communications Galaxy, Inc. (Hughes) filed comments indicating that Hughes has no objection to this request provided AT&T (i) takes adequate steps to protect Hughes's Galaxy VII(H) satellite from interference and (ii) agrees to cease testing if interference occurs and not to resume testing until the problem is resolved. In its reply, AT&T has agreed to these points. For the reasons discussed below, AT&T's request is granted.

2. TELSTAR 401 has been authorized to operate at 97^0 W.L. as a replacement for TELSTAR 301.[1] AT&T plans to launch TELSTAR 401 in December 1993 and anticipates that TELSTAR 301 will still be operating at that time.[2] Prior to commencing regular operation, TELSTAR 401 needs to be tested. AT&T anticipates that this testing process will take approximately eight weeks. AT&T indicates that it would not be feasible to test TELSTAR 401 at 97^0 W.L. while TELSTAR 301 is still operating because it would cause service disruption to customers receiving service on that satellite.

3. Further, AT&T states that testing TELSTAR 401 at 89 W.L. would not adversely affect the operation of GTE Spacenet Corporation's Spacenet 3 satellite at 87^0 W.L. or Hughes's Galaxy VII(H) satellite at 91^0 W.L. As it indicates in its reply, AT&T has been coordinating with Hughes, and will continue to do so during the testing period.[3] AT&T represents it will promptly move the TELSTAR 401 satellite to its assigned 97^0 W.L. location upon completion of testing.

4. Granting the AT&T request will serve the public interest, convenience and necessity. Testing TELSTAR 401 at 89^0 W.L. will allow AT&T to continue to provide service to its TELSTAR 301 customers while insuring that TELSTAR 401 is fully operational before it is placed into service. In addition, the parties have agreed to continue coordinating to avoid and resolve potential interference problems. We therefore grant this request.

5. Accordingly, IT IS ORDERED that Application File No. 57-DSS-STA-93 IS GRANTED and American Telephone and Telegraph Company IS AUTHORIZED to test TELSTAR 401 at the 89^0 W.L. orbital location for an eight week period after the satellite is launched. At the expiration of this period, TELSTAR 401 must be moved to its regularly assigned location of 97^0 W.L.

6. IT IS FURTHER ORDERED that no harmful interference shall be caused to any other lawfully operated radio station and American Telephone and Telegraph Company shall cease operation immediately upon notification of interference.

7. IT IS FURTHER ORDERED that American Telephone and Telegraph Company shall notify the Commission in writing no later than seven days after the testing of TELSTAR 401 is completed.

8. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[1] *See* American Telephone and Telegraph Company, 3 FCC Rcd 6980 (1988) (authorization to construct, launch and operate TELSTAR 401 -- File No. 6028-DSS-P/LA-87).

[2] By separate order, AT&T has been granted authority to operate TELSTAR 301 in an inclined orbit mode and to continue to operate at 96^0 W.L. until TELSTAR 401 is successfully operating at its assigned location of 97^0 W.L.

[3] *See* AT&T Reply at 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. DOCKET 86-285

In the Matter of

Establishment of A Fee Collection
Program to Implement the Provisions
of the Omnibus Budget
Reconciliation Act of 1989

ORDER

Adopted: November 19, 1993; Released: December 17, 1993

By the Commission:

1. In this order the Commission adopts changes to its rules regarding collection of fees for ship inspections and the SMRS Waiting List. 47 C.F.R. § 1.1117. The rule changes are discussed below and are fully set forth in the Appendix.

2. Currently, fees for ship inspections are collected by billing after ship inspections are conducted. 47 C.F.R. § 1.1117. However, not all licensees are paying their bills. As of the first of this year, there were 62 outstanding accounts, totalling $22,100 from prior years. Moreover, significant Commission resources are being diverted to the problem of collecting unpaid fees. To resolve this problem, we no longer will use the administrative billing procedure to collect fees for ship inspections. In the future, we will only inspect ships that have paid their fees in advance and will amend section 1.1117 of the Commission's Rules accordingly. [1]

3. As to those ships currently in arrears in paying their inspection fees, licensees are also on notice that the Commission in accordance with existing rules and policies plans to enforce fully the rules governing non-payment of fees. Specifically, the Commission plans to rescind existing certifications where payment has not been made and will defer action on other pending applications. [2]

4. Finally, the Commission is also amending its Rules to eliminate the applicability of the billing procedure to the SMRS Waiting List. The process of billing SMRS Waiting List entities has proved to be administratively burdensome. The Commission will issue a Public Notice explaining how and when to remit the Waiting List fee. Any entity that fails to pay in accordance with that Notice will be dismissed from the Wait List.

5. Because the change in applicability of the billing procedure adopted herein is a matter of agency practice and procedure, prior notice and comment is not required. 5 U.S.C. §553(b)(A).

6. Accordingly, IT IS ORDERED that section 1.1117 of the Rules and Regulations of the Federal Communications Commission IS AMENDED in the manner indicated in the Appendix of this Order, to be EFFECTIVE 60 days after publication in the Federal Register.

7. Authority for this action is contained in sections 4(i), 4(j) 8 and 303 (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 158 and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 1 of Title 47 of the C.F.R. is amended as follows:

1. The authority citation for part 1 continues to read:

Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

Part 1 - Practice and Procedure

2. In Section 1.1102(6)(e), the words "Applicants will be billed for the amount due and should remit to the address shown on the bill" are deleted.

3. In Section 1.1102(6)(e), the words "The FCC will release a Public Notice annually stating the fee amount due and the address to which the fee should be sent" will be inserted under the column labeled "Address."

4. In Section 1.1117(a), the words "SMRS waiting list (§ 1.1102(g)(4) of this subpart), . . . Ship Inspections (§ 1.1103(k)(1-5) of this subpart)" are deleted.

5. In Section 1.1117(a), the reference to "§ 1.1103(i) of this subpart" is deleted and inserted in its place is "§ 1.1103(19) of this subpart".

6. In Section 1.1117(a), the reference to "§ 1.1105(u)(1) of this subpart" is deleted and inserted in its place is "§ 1.1105(21)(a) and (b)."

[1] Requiring advance payment is consistent with our procedures for most other fees. The billing procedure will continue to be used to collect applicable fees for requests for Special Temporary Authority, audits, and international Telecommunications Settlements.

At this time, Section 1.1117(a) is also amended to correct two references to other rule sections. These are minor technical amendments not requiring notice and comment.

[2] *See* 47 C.F.R. §1.1110(c); *Establishment of A Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act*, 67 RR2d 873, 879, 880 (1990); Public Notice 3491, released June 7, 1990, "Unpaid Fees Billing Procedures."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX TELEVISION STATIONS, INC.

Licensee of Television Station
WNYW, New York, New York

Request for Waiver of the
Broadcast-Newspaper
Cross-Ownership Rule Relating
to WNYW and the *New York Post*

ORDER

Adopted: November 19, 1993 Released: December 17, 1993

By the Commission: Commissioner Barrett dissenting.

1. This order denies a petition filed by the Caucus for Media Diversity (Caucus) seeking reconsideration of *Fox Television Stations, Inc.*, 8 FCC Rcd 5341 (1993).[1]

I. BACKGROUND

2. The matters before us arise from a request by Fox Television Stations, Inc. (Fox) for a waiver of 47 C.F.R. § 73.3555(d)(3) to permit the common ownership of television station WNYW and the *New York Post* by entities controlled by K. Rupert Murdoch, in connection with his proposed acquisition of the *Post*. That rule generally prohibits the common ownership of a broadcast station and a daily newspaper in the same market.

3. On July 9, 1993, we issued a declaratory ruling holding that "it is in the public interest to waive the cross-ownership rule in order that Murdoch may indefinitely control both the *Post* and WNYW." 8 FCC Rcd at 5354 ¶ 57. We concluded:

> . . . under the "special circumstances" before us, that permanent waiver is warranted. First, we are persuaded that the risk to the viability of the *Post*, should we decline to grant Fox's request, thereby eliminating Murdoch as a potential bidder before the bankruptcy court, is very substantial. We believe that our interest in diversity would not be well-served by taking that risk. Second, we conclude that a grant of a permanent waiver is an appropriate accommodation between communications-related policies and bankruptcy-related policies. In this regard, our decision will facilitate the task of the debtor, the creditors and the bankruptcy court by removing any uncertainties arising from the existence of our cross-ownership rule.

Id. at 5349 ¶ 42.

4. As a collateral matter, we found that allegations by Caucus that, in seeking a waiver, Fox made misrepresentations and lacked candor did not raise substantial and material questions of fact.

5. Caucus first asserted that Fox falsely told the Commission, in its waiver request, that it was imperative that the Commission act by June 1, 1993, because the interim agreement under which Murdoch managed the *Post* had a termination date of June 1. Caucus accused Fox of concealing the fact that the agreement provided for a 30-day extension to July 1 and that the management agreement would be so extended.

6. The Commission found that Fox's language urging the Commission to act by June 1 was intemperate, in view of the 30-day extension provision, but that it did not materially distort the facts. 8 FCC Rcd at 5356 ¶ ¶ 67-68. We noted that other language in the waiver request disclosed that Murdoch would manage the *Post* until *at least* June 1. Moreover, despite the extension provision, Murdoch was contractually obligated to manage the *Post* only until June 1. Thus, Fox did not conceal that the June 1 "deadline" was self-imposed and subject to being extended if Murdoch so desired, and could truthfully represent that there was a potential risk that Murdoch would abandon the *Post* if he did not believe, as of June 1, that favorable Commission action was likely.

7. Caucus next asserted that Fox misrepresented that Murdoch was the only serious potential puchaser of the *Post*. Caucus claimed that Champion Holding Company also sought to acquire the *Post*.

8. In this regard, the Commission found that, although Champion had taken some steps toward attempting to acquire the *Post*, the evidence raised no substantial and material question of fact that Fox knew of Champion's continuing efforts. 8 FCC Rcd at 5356-57 ¶ ¶ 69-74. We found that the evidence contained undisputed statements by Murdoch attorney, Arthur M. Siskind, and *Post* vice president, Peter Faris, that after Faris spoke to Champion's owner, Faris told Siskind that Champion would not pursue its bid for the *Post*. The evidence also contained undisputed statements that: (1) officials of Fox and the *Post* were not informed that Champion had subsequent contacts with a *Post* official named Stephen Bumbaca; and (2) no representative of Murdoch had been present when Champion made a presentation to the *Post*'s creditors committee. Additionally, we found that there was no reason that Fox would have been informed of Champion's efforts, since Champion's bid was of questionable viability, and Champion was unsuccessful in interesting either the *Post*'s management or the creditors' committee in its proposal, which Champion ultimately abandoned.

[1] The Commission has before it: (1) a Petition for Reconsideration, filed August 9, 1993, by the Caucus for Media Diversity, and an opposition, filed August 21, 1993, by Fox Television Stations, Inc.; (2) a Motion to Hold in Abeyance, filed September 1, 1993, by Caucus, and an opposition, filed September 13, 1993, by Fox; (3) a Motion for Leave to File Comments on Reconsideration, filed September 20, 1993, by the Metropolitan Council of NAACP Branches and the *New York Amsterdam News*, associated comments, an opposition, filed October 5, 1993, by Fox, and a reply, filed October 13, 1993, by NAACP; and (4) a Supplement to Comments on Reconsideration, filed November 19, 1993, by NAACP.

II. DISCUSSION

9. In its petition for reconsideration, Caucus asserts that the Commission's ruling did not provide a reasoned basis for concluding that Caucus' allegations raised no substantial and material question of fact. Caucus reiterates its claims that Fox made misrepresentations and lacked candor. Fox responds that the Commission's ruling was thorough, well-reasoned, and supported by the record. [2]

10. We agree with Fox that Caucus' petition for reconsideration does not raise any matter that was not thoroughly considered in making our declaratory ruling. [3] It is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

III. ORDERS

11. ACCORDINGLY, IT IS ORDERED, That the Motion to Hold in Abeyance, filed September 1, 1993, by the Caucus for Media Diversity IS DENIED.

12. IT IS FURTHER ORDERED, That the Motion for Leave to File Comments on Reconsideration, filed September 20, 1993, by the Metropolitan Council of NAACP Branches and the *New York Amsterdam News* IS DENIED.

13. IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed August 9, 1993, by the Caucus for Media Diversity IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[2] In its motion for leave to file comments on reconsideration, as supplemented, NAACP seeks to comment on the impact on this proceeding of a proposal by Fox to acquire station WGBS-TV in Philadelphia. Fox requires a waiver of the Commission's multiple ownership rules to acquire the Philadelphia station because its Grade B contour overlaps that of WNYW in New York. In a petition to deny in the Philadelphia proceeding (which NAACP incorporates in its comments), NAACP asserted that Fox's acquisition of the Philadelphia station, in conjunction with ownership of the New York television station and newspaper, would create a regional concentration of media control contrary to the public interest. NAACP also asserts that Fox is in violation of 47 U.S.C. § 310(b), which limits alien ownership of broadcast stations. The issues raised in the Philadelphia proceeding are unrelated to our reasons for granting a waiver in New York and to the issues before us on reconsideration. They will be resolved in the Philadelphia proceeding. To the extent that NAACP challenges Fox's qualifications to be a licensee, we note that this is not a licensing proceeding. Accordingly, we will deny NAACP's motion.

[3] In its motion to hold in abeyance, Caucus -- noting that the Commission's previous action in this proceeding was by a 2-1 vote -- asks the Commission to hold the petition for reconsideration in abeyance until the appointment of additional Commissioners permits the input of a full complement of decisionmakers. However, where, as here, a quorum of the Commission has taken valid action, it is no objection that the decision was not reached by a full complement of five Commissioners. *See Uniform Sunset Time*, 5 RR 2d 1525, 1526 ¶ 4 (1965). *See also* 47 U.S.C. 154(c), (h).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Thomas N. Locke FOIA Control No. 93-184

Freedom of Information Act Request

MEMORANDUM OPINION AND ORDER

Adopted: November 29, 1993; Released: December 17, 1993

1. The Commission has under consideration an Application for Review filed on July 30, 1993, by U.S. WEST, Inc. (U.S. West) appealing a July 15, 1993, Freedom of Information Act (FOIA) decision by the Chief, Common Carrier Bureau, (*Bureau Order*). For the reasons discussed herein, we grant in part and deny in part U.S. West's Application for Review.

BACKGROUND

2. On June 16, 1993, the Commission received an FOIA request from Thomas N. Locke (Locke) seeking access to several leases involving U.S. West and some of its affiliates. Commission auditors had obtained the leases from U.S. West during the course of a Commission audit commenced on July 23, 1990.[1] In its ruling below, the Bureau concluded that although the leases probably contained some information that could be competitively damaging, some material in the leases was either publicly available or so general as to be of no competitive utility. Because U.S. West had not identified those specific portions of the leases that might contain competitively valuable information, the Bureau denied confidentiality.[2] On appeal, U.S. West challenges the Bureau's determination, supplies additional information specifying which portions of the leases are competitively sensitive, and argues that the leases may be withheld pursuant to FOIA Exemption 4, 5 U.S.C. §552 (b)(4).

DISCUSSION

3. Pursuant to Exemption 4 of the FOIA, an agency may withhold information consisting of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C.§ 552(b)(4). Because the leases in question clearly are commercial information, the issue before us is whether the materials sought are "confidential." In *National Parks and Conservation Ass'n v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974), the court held information is confidential within the meaning of Exemption 4 if either (1) disclosure of the information sought is likely to impair the government's ability to obtain necessary information in the future; or (2) disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. The D.C. Circuit recently reaffirmed this test, but confined it to cases involving information that persons were required to provide to the government. For cases involving information that has been voluntarily supplied to the government, the court has adopted a new test. Financial or commercial information provided to the government on a voluntary basis is exempt under Exemption 4 "if it is of a kind that the provider would not customarily release to the public." *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992); *cert. denied*, 113 S. Ct. 1579 (1993). Under *Critical Mass*, therefore, a pivotal question relating to which Exemption 4 test is applicable is the distinction between "voluntary" and "required" submissions. Finally, a third reason for withholding documents under Exemption 4 is where disclosure of the information would impair the effectiveness of a government program. *See 9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve System*, 721 F. 2d 1.10 (1st Cir. 1983).

4. We conclude that the leases in question are exempt from public disclosure under the *National Parks* "competitive harm" test.[3] The four leases for which U.S. West requests confidentiality are subleases between U.S. West (as lessor) and various tenants, in buildings in which U.S. West has leased the entire building both for its own use and for purposes of subleasing.[4] The documents thus reflect detailed financial arrangements between U.S. West and third party lessees that directly affect U.S. West's commercial leasing operations. U.S. West points out that release of the information could give prospective or current tenants or leasing competitors valuable insight into how U.S. West

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[1] *See* Letter dated July 23, 1990 to William Johnston from Jose-Luis Rodriguez.

[2] Locke requested access to eight leases. At the time of the *Bureau Order* only four leases were located. Subsequently, the staff located two additional leases. Further, U.S. West has voluntarily agreed to release two of the subject leases. Therefore, the only documents that are the subject of this Application for Review are the following: 1. 188 Inverness Drive West lease; 2. 198 Inverness Drive West lease; 3. Lease between The Connecticut National Bank and US West Advanced Technologies, Inc; 4. 7800 East Orchard Road lease.

[3] In its appeal, U.S. West argues in part that the leases in question were voluntarily submitted to the Commission, and, hence, are exempt from disclosure under the *Critical Mass* test. We need not decide that factual issue in this case, however, because, as discussed above, U.S. West has met its burden of establishing that Exemption 4 applies under the "competitive harm" test. As a general matter, we note, however, that carriers typically have voluntarily assisted the Commission in the audit process, thereby obviating the need to rely on compulsory measures to obtain necessary materials.

[4] In its Application for Review, U.S. West submitted an attachment listing the specific lease terms and sections whose release would cause U.S. West competitive harm. As discussed above, U.S. West has met its burden of confidentiality for those provisions. U.S. West argues in addition that the remaining portions of the leases are entitled to Exemption 4 protection because the materials are not reasonably segregable from the exempt materials. *See* 5 U.S.C. §552(b). Nonexempt material may be withheld if it is so "inextricably intertwined" that its disclosure would "leave only essentially meaningless words and phrases." *Neufeld v. IRS*, 646 F. 2d 661,663 (D.C. Cir. 1981). In this case the nonexempt materials consist of numerous full paragraphs that are readily segregable. Moreover, even under the more lenient *Critical Mass* test, U.S. West did not establish that these portions would not customarily be released to the public. For example, U.S. West indicates that the portions of the leases not designated as confidential are either clearly public ... or are

structures and prices its leasing operations. Specifically, release of the information would give potential tenants an advantage in negotiating leases, as well as enable competitors to compete more effectively in securing tenants. We agree with U.S. West that disclosure of such competitively valuable information would cause U.S. West substantial competitive harm and that the requirements of Exemption 4 are satisfied.[5]

5. Further, Locke has not made a persuasive showing that the documents should be released despite their confidentiality. Locke makes a general allegation that release of information concerning the real estate dealings of U.S. West is "of great importance in devising a national policy for Regional Bell Operating companies...." Our general policy, however, is to maintain the confidentiality of audit records except in unusual circumstances. *See In the Matter of Scott J. Rafferty*, 5 FCC Rcd. 4138 (1990); *In the Matter of J. David Stoner*, 5 FCC Rcd.6458 (1990); *In the Matter of Martha H. Platt*, 5 FCC RCd 5742 (1990). One purpose of this policy is to ensure that carriers continue to voluntarily assist the Commission in the audit process not only by permitting the examination of existing records, but also by allowing employee interviews and preparing new documents which otherwise would not be created. *See In the Matter of Martha H. Platt*, 5 FCC Rcd at 5742. Given these strong policy considerations, as well as the potential competitive harm that would occur from disclosure, we conclude that the overall public interest would not be served by allowing public inspection of these documents.[6]

6. In view of the foregoing, the Application for Review filed by U.S. West, Inc. IS GRANTED to the extent indicated herein and otherwise DENIED. Thomas N. Locke may seek judicial review of this decision pursuant to 5 U.S.C. §552(a)(4)(B). In addition, U.S. West will be afforded 10 working days in which to seek a judicial stay. *See* 47 C.F.R. §0.461(h)(4). U.S. West may seek judicial review of this decision pursuant to 5 U.S.C. §702.

7. The officials responsible for this action are the following Commissioners: James H. Quello, Chairman, Andrew C. Barrett, and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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strictly "boilerplate." Therefore, in the absence of any further showing by U.S. West, the materials will be made available for public inspection.

[5] In response to the Application for Review, Locke cites to a decision of the Iowa Supreme Court wherein the court determined that summary lease information concerning the subject properties should be made publicly available. *See U.S. West Communications v. Office of Consumer Advocate*, No. 109/92-403 (April 21, 1993). We are not, however, bound by that state court decision. The Iowa court did not analyze the materials pursuant to the requirements of the FOIA. Rather, it considered the case pursuant to discreet provisions of the Iowa code that involve a different set of legal and factual considerations. Finally, the Iowa court considered only the availability of summary information whereas the leases themselves (containing detailed, specific information not made available by the state court) are at issue here.

[6] Compare *New York Telephone Co.*, 5 FCC Rcd 874 (1990); *National Exchange Carrier Association*, 5 FCC Rcd 7184 (1990) (Commission released summary audit information contained in FCC audit reports that served as the basis for enforcement proceedings in which the ratepayers had a vital interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Global Cellular
Communication, Inc.

Application for authority to construct and operate a nationwide, commercial 220 MHz SMR system — Lottery ID No. 049

ERRATUM

Released: December 17, 1993

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. In the order released November 22, 1993 in the above captioned matter, the next to last sentence in Paragraph 4 is hereby amended to read:

> "Specifically, petitioners assert that Global's application is fatally defective due to Common Carrier precedent requiring an original signature on a commitment letter.[3]

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Citizens Utilities Company

Petition for Waiver of
Sections 61.41(c) and (d) and Sections
69.3 (e)(11) and (i)(4)
of the Commission's Rules in the States
of Arizona, Idaho, Montana, New York,
Tennessee, Utah and West Virginia

ORDER

Adopted: December 1, 1993; Released: December, 3 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 21, 1993, Citizens Utilities Company (Citizens) filed a petition for waiver of Sections 61.41(c) and (d) and Sections 69.3 (e)(11) and (i)(4) of the Commission's rules.[1] Citizens seeks a waiver of these rules in order to remain under rate-of-return regulation after acquiring certain telephone exchanges in Arizona, Idaho, Montana, New York, Tennessee, Utah and West Virginia from subsidiaries of GTE Corporation (GTE), which currently are subject to price cap regulation. Citizens also sought waiver of Commission rules to permit these exchanges to participate in the NECA carrier common line pool; however, on November 29, 1993, Citizens withdrew its request to include the acquired properties in the pool.[2] These acquisitions will add approximately 492,000 access lines to Citizens' current 150,000 access lines.

2. According to Citizens grant of its waiver petition would not undermine the purposes of Section 61.41(c) and (d) because the policy concerns that 61.41(c) and (d) address are not raised by this transaction. Specifically, Citizens maintains that it lacks the ability to shift costs between price cap and rate of return affiliates,[3] or to "game" the price cap system.[4] Citizens also argues that grant of its request would serve the public interest because the planned acquisitions will allow it to realize substantial efficiencies and to develop scale economies by providing state-of-the-art telecommunications services to additional small and mid-sized communities.[5]

3. On October 22, 1993, the United States Telephone Association (USTA) and the National Exchange Carrier Association (NECA) filed comments in support of Citizens' petition. In support of Citizens' request for waiver of Section 61.41, USTA argues that, after closing, Citizens still will be substantially smaller than the carriers owned and operated by GTE and the seven regional Bell operating companies. USTA states that the Commission has previously granted a similar price cap waiver to the Alltel Service Corporation, which owns and operates over 1.3 million access lines in various regions.[6] USTA argues that a forced conversion to price cap regulation could have a serious and devastating impact on the financial and operational performance of Citizens.[7] NECA argues that the pending acquisitions are arms length transactions between unaffiliated entities. Thus, NECA asserts, there is no opportunity for Citizens to "game the system."[8] NECA also contends that planned facility upgrades by Citizens will expand the range and quality of services provided to customers in the acquired study areas.[9]

4. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[10] Absent such a rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) while generating greater earnings for the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Also, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps which rewards carriers for making efficiency gains.[11]

5. We conclude that there is good cause to grant Citizens a waiver of Sections 61.41(c) and 61.41(d) of the Commission's rules. The first concern identified by the Commission in adopting these rules -- cost-shifting between affiliates -- is not at issue here. Citizens is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rules -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts in this case. The study areas that will be acquired by Citizens will be subject to rate of return regulation.

6. Further, in the *LEC Price Cap Order*, the Commission made price cap regulation optional for carriers smaller than the largest eight. The Commission recognized that smaller companies should not be forced into a regulatory regime that was designed based largely on the historical

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[1] 47 C.F.R. §§ 61.41(c), (d); 47 C.F.R. §§ 69.3 (e)(11), (i)(4).

[2] Letter from Citizens to W. F. Caton, Actg. Sec., FCC (Nov. 29, 1993).

[3] Citizens Petition for Waiver at 6.

[4] *Id.* at 6.

[5] *Id.* at 7.

[6] USTA Comments at 3; *citing* Petition for Waiver of Section 61.41(c) of the Commission's Rules, *Order*, 8 FCC Rcd 7054 (Com. Car. Bur. 1993).

[7] *Id.*

[8] NECA Comments at 3.

[9] *Id.*

[10] Section 61.42(c)(2) of the Commission's Rules, 47 C.F.R. § 61.42(c)(2). Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*).

[11] *See LEC Price Cap Reconsideration Order*, FCC Rcd 2637, 2706.

performance of the largest local exchange carriers.[12] Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Operating Companies, our application of the all-or-nothing rule must take into account the Commission's concerns about applying the price cap system to smaller carriers. Although Citizens' total number of access lines after the acquisitions will be substantially larger than that of most companies for which waivers of the rule have been granted, Citizens will still be significantly smaller than the eight LECs for which price caps is mandatory. The post-acquisition size of Citizens will also be smaller than that of ALLTEL, that was also granted a waiver of the price cap rules.[13] Therefore, it is consistent with the rationale of the *LEC Price Cap Order* to allow price cap regulation to remain optional for Citizens.

7. Given all of the circumstances raised in this case, we find that it is in the public interest to grant a waiver of the all-or-nothing rule. Our waiver of Sections 61.41 (c) and (d) allows the exchanges Citizens is purchasing from GTE in the states listed above to become subject to rate of return regulation.

ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §4(i), and Section 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91, 0.291, that the Petition for Waiver of Citizens Utilities Company, for waiver of Section 61.41(c) and (d) of the Commission's rules, 47 C.F.R. §61.41(c) and (d), IS GRANTED to the extent discussed *supra*, and IS OTHERWISE DENIED.

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Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[12] *See* Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *appeals of LEC Price Cap Order affirmed sub nom., National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[13] ALLTEL Service Corporation, 8 FCC Rcd 7054 (Com. Car. Bur. 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 3, 1993

BELLSOUTH PETITIONS COMMISSION REGARDING HOST-REMOTE SWITCHED TRANSPORT CONFIGURATIONS - CC DOCKET NO. 91-213

Pleading Cycle Established

COMMENTS: December 10, 1993
REPLIES: December 17, 1993

On November 15, 1993, BellSouth Telecommunications, Inc. (BellSouth), petitioned the Commission for a waiver of certain requirements regarding host-remote switched transport configurations established in the Commission's First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 (released July 21, 1993). BellSouth seeks waiver for dedicated transport in those instances in which the customer's serving wire center and the host office are located in different Local Access and Transport Areas (LATAs).

BellSouth states that it has come to their attention that it has a very limited number of interLATA host-remote configurations in its operating region. Only three host offices and six remote offices are involved. BellSouth also argues that it cannot modify its existing account on a selective basis.

Interested parties wishing to file comments or oppositions to this petition are invited to do so no later than December 10, 1993. Parties filing replies may do so no later than December 17, 1993. American Telephone and Telegraph has already filed a petition, it need not refile in response to this public notice.

An original and five copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's duplicating contractor, International Transcription Services (ITS), Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of this petition and other related documents may be obtained from ITS. The document is also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Andrew Mulitz, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Tariff F.C.C. No. 12
Option 24

ORDER

Adopted: December 9, 1993; Released: December 9, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 30, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing revises a service agreement between AT&T and the initial Option 24 customer to increase the minimum annual charge, and adds an Optional Feature Volume Pricing Plan and a Revenue Stimulation Plan. The transmittal is currently scheduled to take effect on December 23, 1993.

2. On October 4, 1993, Public Service Enterprises of Pennsylvania, Inc., (PSE) filed a petition to reject Transmittal No. 5839. AT&T filed a reply on October 7.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 5839, PSE's petition, and AT&T's reply. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order.

4. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 5839, filed by Public Service Enterprises of Pennsylvania IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Applications of

GENERAL TELEPHONE
COMPANY OF CALIFORNIA

For authority pursuant to Section 214 of the Communications Act of 1934 and Sections 63.01 and 63.57 of the Commission's rules and regulations to construct and maintain broadband transport facilities in Cerritos, California: File No. W-P-C-5927

and

For authority pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's rules and regulations to construct, operate and maintain broadband transport fiber optic facilities in Cerritos, California File No. W-P-C-6250

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: December 6, 1993

By the Commission: Chairman Hundt not participating.

INTRODUCTION

1. In this Memorandum Opinion and Order, we address a motion by GTE California Incorporated ("GTECA") for a stay of the Commission's *Cerritos Remand Order*,[1] released November 9, 1993. GTECA seeks an administrative stay pending review of the Commission's remand decision by the United States Court of Appeals for the Ninth Circuit. Alternatively, GTECA asks the Commission to stay a December 9, 1993, compliance plan filing deadline until 30 days after the Ninth Circuit rules on a motion for judicial stay that GTECA states it will file with the court if the Commission denies its request for a full administrative stay. Because we conclude that GTECA has failed to meet the standards for a stay, we deny GTECA's motion. However, in order to provide for a more orderly planning and transition process, we will defer the December 9, 1993, compliance plan filing deadline until January 10, 1994.

BACKGROUND

2. In the *Cerritos Remand Order*, the Commission revisited its grant of a temporary, conditional waiver of its telephone company/cable television cross-ownership rules to GTECA in connection with GTECA's participation in a cable television experiment in Cerritos, California. The Commission acted in response to the ruling of the United States Court of Appeals for the District of Columbia Circuit, which held that the Commission had not justified its grant of a waiver and remanded the case to the Commission for further consideration.[2] On remand, the Commission determined that GTECA had failed to justify a waiver of the cross-ownership rules under the standard enunciated by the court. Accordingly, the Commission rescinded the original rule waiver, as well as associated grants of Section 214 authority, effective 120 days from the release date of the *Cerritos Remand Order*. The Commission directed GTECA to come into compliance with the telephone company/cable television cross-ownership prohibition within 120 days, and further directed GTECA to file with the Commission a compliance plan, as well as any necessary requests for authorization, within 30 days. The compliance plan and any associated requests for authorization are due to be filed with the Commission on December 9, 1993.

3. GTECA responded by filing a petition for review of the Commission's remand decision with the Ninth Circuit on November 19, 1993.[3] GTECA subsequently filed the instant motion for administrative stay with the Commission on November 29, 1993. The National Cable Television Association filed an opposition on December 2, 1993. The City of Cerritos submitted comments in support of GTECA's motion on December 3, 1993.

DISCUSSION

4. The Commission evaluates petitions for stay under well-settled principles. To support a stay, GTECA must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[4]

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[1] *General Telephone Company of California, Memorandum Opinion and Order on Remand*, FCC 93-488 (" *Cerritos Remand Order*"), *petition for review docketed sub nom. GTE California v. FCC*, No. 93-70924 (9th Cir. filed Nov. 19, 1993). The *Cerritos Remand Order* contains a full discussion of the procedural history of this proceeding and the substantive issues involved.

[2] *See National Cable Television Ass'n. v. FCC, as amended on denial of rehearing and rehearing en banc*, 914 F.2d 285 (D.C. Cir. 1990), *remanding General Telephone Company of California*, 4 FCC Rcd 5693 (1989) (*"Cerritos Order"*).

[3] *See* n.1, *supra*.

[4] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985 (per curiam); *Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5585 (1993) (denying blanket request for stay of the Commission's cable television rate regulation rules).

5. A concrete showing of irreparable harm is an essential factor in any request for stay.[5] The courts have required a stringent standard of proof on this issue, stressing that "the injury must be both certain and great; it must be actual and not theoretical. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."[6] When, as in this case, the alleged harm has not yet occurred, the petitioners must provide proof indicating that the injury "is certain to occur in the near future."[7] Moreover, the harm must "directly result from the action which the movant seeks to enjoin."[8]

6. GTECA has failed to meet the standards for a stay in this proceeding. In particular, GTECA has failed to demonstrate that it will suffer irreparable harm if a stay is not granted. First, the original waiver, granted to GTECA in July 1989, was expressly limited in duration to five years.[9] Irrespective of any action by the Commission on remand, GTECA's conditional, temporary waiver was set to expire by its express terms in July 1994. Thus, absent an extension of the original waiver, GTECA's experimental activities in Cerritos would have had to cease in July 1994.[10] Under the Commission's decision on remand, GTECA's experiment would terminate in March, rather than July, 1994. GTECA has not shown how terminating the five year experiment four months early will cause the company irreparable harm. Indeed, given that GTECA will have conducted experimental activities in Cerritos for approximately 56 months out of the original 60 month waiver period, it is difficult to imagine how GTECA could make the requisite showing of irreparable harm.

7. Further, we note that any alleged harm that may be caused results in part from GTECA's own business decision to proceed with construction and operation at its own risk. As early as 1988, prior to the Commission's review in the *Cerritos Order* of the Common Carrier Bureau's grant of a staff-level waiver, GTECA was put on explicit notice that it "necessarily assumes the risk that if the Bureau's decision is reversed, it may have to undo, at some cost and inconvenience to itself, actions it took in reliance on that decision -- which in this case may involve the sale or dismantling of partially constructed cable facilities."[11] Moreover, after the court remand in 1990, GTE continued with its experimental activities with full knowledge that the court had faulted the Commission's original grant of waiver and directed the Commission to revisit the issue. Under these circumstances, GTECA cannot plausibly argue that its business plans and relationships have been unfairly disrupted by the Commission's remand decision and that it will suffer irreparable harm as a result of the Commission's action.

8. Finally, GTECA argues for the first time in its stay request that the Commission's decision to rescind the waiver and require GTECA to come into compliance with the telephone company/cable television cross-ownership provision infringes on GTECA's First Amendment rights of free expression. GTECA rests its argument on a recent decision by the U.S. District Court for the Eastern District of Virginia declaring that the statutory telephone company/cable television cross-ownership provision contained in 47 U.S.C. § 533(b)(1) is unconstitutional.[12] Given that GTECA raises this argument in the context of a stay request that it wishes resolved expeditiously, we do not have the opportunity to address this issue in detail. We note, however, our view that the telephone company/cable television cross-ownership prohibition constitutes structural regulation of the telecommunications marketplace that is fully consistent with the First Amendment.[13]

9. While GTECA has not justified a stay, we recognize that the original December 9, 1993, compliance plan filing requirement imposed rather tight time constraints on GTECA to develop, in conjunction with its subsidiary GTE Service Corporation and its customer, Apollo Cablevision, a formal plan for modifying the Cerritos project in accordance with the *Cerritos Remand Order*. We are persuaded that a brief extension of that deadline will permit a more orderly planning process and will facilitate the transition from an experimental environment to a commercial endeavor consistent with the cross-ownership rules. We therefore defer the December 9, 1993, compliance plan filing date until January 10, 1994.[14]

CONCLUSION

10. We conclude that GTECA has failed to meet the standards for a stay. In particular, we find that GTECA has failed to demonstrate that it will suffer irreparable harm if a stay is not granted. We therefore deny GTECA's motion. However, we defer the December 9, 1993, compliance plan filing deadline until January 10, 1994.

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[5] *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985); *Wisconsin Gas*, 758 F.2d at 674.

[6] *Wisconsin Gas*, 758 F.2d at 674 (emphasis in original).

[7] *Id.*

[8] *Id.*

[9] *See Cerritos Order*, 4 FCC Rcd at 5700 (para. 52), 5701 (para. 61).

[10] We note that GTECA has not asked the Commission for such an extension.

[11] *General Telephone Company of California*, 4 FCC Rcd 1340, 1341 (para. 6) (Com. Car. Bur. 1988) (order denying request for stay by opponents of waiver).

[12] *See Chesapeake & Potomac Telephone Co. of Virginia v. U.S.*, 830 F. Supp. 909 (E.D. Va. 1993) ("*C&P*"), *appeal docketed*, No. 93-2340 (4th Cir. Oct 15, 1993). In the *Cerritos Remand Order*, at 2 n.3, we noted that the District Court in *C&P* subsequently issued an Amended Final Order clarifying that its August 24, 1993, decision and order applied only to the plaintiffs in that case. Bell Atlantic Corporation and certain specified Bell Atlantic subsidiaries. The District Court also denied motions to intervene filed by GTE subsidiaries GTE Service Corporation, Contel of Virginia, Inc. and GTE Vantage, Inc. *C&P*, No. 92-1751-A, Order and Amended Final Order (E.D. Va. Oct. 7, 1993).

[13] *See generally FCC v. Nat'l. Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Associated Press v. United States*, 326 U.S. 1 (1945).

[14] Likewise, the rescissions of the cross-ownership waiver and associated Section 214 authorizations will now become effective 150 days (rather than 120 days) from the November 9, 1993, release date of the *Cerritos Remand Order*. GTECA shall come into compliance with the cross-ownership restriction within this same 150 day period.

ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, that the motion for stay filed by GTE California Incorporated on November 29, 1993, IS DENIED.

12. IT IS FURTHER ORDERED, that GTECA shall file its proposed plan to achieve compliance with the *Cerritos Remand Order* and the telephone company/cable television cross-ownership restriction, including any necessary requests for authorization, on January 10, 1994.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

CC Docket No. 93-129

In the Matter of

800 Data Base Access Tariffs and the

800 Service Management System Tariff

ORDER

Adopted: November 29, 1993; Released: November 30, 1993

By the Chief, Tariff Division, Common Carrier Bureau

1. On July 19, 1993 the Bureau released an Order,[1] designating issues in our investigation of the 800 data base access tariffs. That order set deadlines by which oppositions to the local exchange carriers' (LECs) direct cases had to be filed. On August 5 and October 18, 1993, the Tariff Division released orders, each of which extended the time for filing pleadings responding to the LECs' direct cases. Currently, replies are due on November 30, 1993 and rebuttals are due on December 10, 1993. On November 23, 1993, the Ad Hoc Telecommunications Users Committee (petitioner) filed a motion to extend the time, until February 15, 1993 (sic), to file its pleadings responding to the LEC direct cases.

2. Several LECs have filed petitions for waiver of the cost disclosure requirements of paragraph 29 of the *Designation Order*.[2] Petitioners contend that this extension is necessary to allow the LECs to file, and the commenters to comment on, revised cost support if the Commission denies the LEC petitions for waiver.

3. The Division has reviewed petitioners' request for extension of time and has determined that good cause has been shown to grant an extension to all parties. Therefore, pleadings responding to the direct cases will now be due on January 5, 1994. Rebuttals to oppositions or comments will be due on January 20, 1994.

4. Accordingly, IT IS ORDERED that the petition for extension of time filed by Ad Hoc Telecommunications Users Committee IS GRANTED, to extend the deadlines for all parties in this proceeding to file pleadings responding to direct cases, and replies, as specified in paragraph 3 of this Order.

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[1] *800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation*, CC Docket 93-129, 8 FCC Rcd 5132 (1993) (*Designation Order*).

[2] *See also Public Notice, Participating Bell Operating Companies, US West and GTE Request Waivers of Requirement to Disclose Cost Support*, CC Docket 93-129, DA 93-1164 (September 27, 1993) (established pleading cycle for comments on LEC petitions for waiver of of cost disclosure requirements in this proceeding).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-302

In re Applications of

VICTORY CHRISTIAN CENTER, INC. (hereafter "VCC") File No. BPH-920326MA

INTERMART BROADCASTING OF NORTH CAROLINA, INC. (hereafter "InterMart") File No. BPH-920326MB

TODD P. ROBINSON (hereafter "Robinson") File No. BPH-920327MI

SATURDAY COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "SCLP") File No. BPH-920327ML

For Construction Permit
for a New FM Station on Channel 224A
in Harrisburg, North Carolina

HEARING DESIGNATION ORDER

Adopted: December 7, 1993; Released: December 17, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Engineering Discrepancies---VCC.* An engineering review of VCC's application, as timely amended on June 29, 1992 during the amendment-as-of-right period, reveals discrepancies in the amendment. First, Items 7(a)(3) and 7(b)(2) show figures of 259 meters and 243 meters for the height of the tower above mean sea level (AMSL) and height of the antenna radiation center AMSL, respectively. These figures differ from the tower sketch, which shows the tower height AMSL as 311 meters and the antenna radiation center AMSL as 306 meters. Noting that VCC's engineering studies show that VCC's proposed station contours were generated using an AMSL value of 306 meters, and further noting that the tower sketch shows 259 and 243 as being the values in feet for the heights of the tower above ground level and the antenna radiation center above ground level, we can confidently and reliably determine that the 259 and 243 values in Items 7(a)(3) and 7(b)(2) are in error and that these figures should be 311 and 306 meters, respectively. These discrepancies do not by themselves render the amendment unacceptable for filing.

3. Nevertheless, VCC's amendment proposed processing under the contour protection rule 47 CFR § 73.215 in order to avoid a spacing deficiency under 47 CFR § 73.207 with respect to first-adjacent channel Class C station WZNS, Dillon, SC. VCC's analysis (using the correct 306 meter figure for the height of the antenna radiation center AMSL) concludes that no prohibited contour overlap will occur. However, an analysis conducted by the staff reveals that this result is in error. Specifically, the staff's computer generated study finds that prohibited contour overlap up to a maximum of 2.1 km in depth will occur between VCC's proposed 60 dBu protected contour and the 54 dBu interfering contour of WZNS, between the azimuths of 109^0 to 135^0, as referenced to VCC's amendment. It appears that VCC's analysis did not use a sufficient number of radials to accurately predict the location of WZNS' 54 dBu contour. Thus, the amendment is unacceptable for filing and will be returned.

4. *Late-Filed Amendment/"Good Cause".* On August 11, 1992, Robinson submitted a petition for leave to amend his application. The engineering amendment proposed to change Robinson's transmitter site. The petition claims "good cause" for the late-filed amendment, explaining that: "Within the last six weeks, Todd Robinson, in consultation with his engineer, realized that the initial application did not specify the intended site but a site located 220 meters from the intended site." However, the petition is unaccompanied by any supporting affidavits of Robinson, his engineer, or any other person with first-hand knowledge of how the alleged misspecification occurred. Therefore, we do not find that good cause for the late filing of the amendment has been adequately shown, *see Erwin O Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), and we will return the amendment. This action is without prejudice to Robinson's right to refile the amendment, accompanied by an appropriate good cause showing, before the presiding Administrative Law Judge, who will then determine whether good cause has been established.

5. *Environmental.* Our engineering review of InterMart's and SCLP's applications, which propose the same transmitter site, reveals the presence of several other antennae on the tower structure. In accordance with the Commission's OST Bulletin No. 65, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation", released October 1985, and the *Public Notice*, entitled "Radiofrequency Radiation and the Environment", released August 19, 1992, it is necessary for applicants to certify that an agreement is in effect among all tower users to reduce power or cease operation as necessary to protect workers from exposure to excessive levels of radiofrequency radiation. In addition, Robinson's proposal indicates that workers will be protected from excessive levels of radiofrequency radiation but fails to indicate what steps will be taken to insure such compliance. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that InterMart, SCLP and Robinson may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA

must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since InterMart, SCLP and Robinson failed to indicate satisfactorily how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, they will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. Accordingly, InterMart, SCLP and Robinson will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

6. *Financial.* In response to Section III, FCC Form 301, SCLP certifies that it has sufficient funds to construct and operate the proposed station (Item 1), and has provided the source of funds together with the amount of funds to be supplied from each source (Item 3). However, SCLP has not provided the estimate of the total funds necessary to construct and operate the proposed facility (Item 3). SCLP shall submit an amendment, providing the financial information, with the presiding Administrative Law Judge.

7. *EEO.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although SCLP has filed such statement, it is deficient. SCLP has not listed any recruitment sources for women. Accordingly, SCLP will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

8. *FAA.* Attempts to obtain FAA clearance through the Commission's Support Services Branch and VCC or Robinson have been unsuccessful. Accordingly, since no determination has been received as to whether the towers proposed by VCC or Robinson would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. *Late-Filed Amendments.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
InterMart	9/25, 11/13/92, 1/4/93 3/11, 5/3/93
VCC	7/21, 9/22/93

10. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the ower height and location proposed by VCC or Robinson would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to InterMart, SCLP or Robinson in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the amendment filed on June 29, 1992 by VCC IS RETURNED.

13. IT IS FURTHER ORDERED, That the amendment filed on August 11, 1992 by Robinson IS RETURNED.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 5 hereinabove, InterMart, SCLP and Robinson shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That SCLP shall submit the information specified in Paragraph 6, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, SCLP shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by InterMart (9/25, 11/13/92, 1/4, 3/11 and 5/3/93) and VCC (7/21 and 9/22/93) ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of

record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AFFINITY NETWORK INCORPORATED,
Complainant,

v. File No. E-93-007

AMERICAN TELEPHONE &
TELEGRAPH COMPANY,
Defendant.

PROTECTIVE ORDER

Adopted: December 9, 1993; Released: December 17, 1993

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. *Non-disclosure of Stamped Confidential Documents.* Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this order, no stamped confidential document may be disclosed to any person.

A "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER IN Complaint No. E-93-007, before the Federal Communications Commission" to signify that it contains information believed to be subject to protection under the Commission's rules. For purposes of this order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

2. *Permissible Disclosure.* Notwithstanding paragraph 1, stamped confidential documents may be disclosed to counsel for the parties in this action, including in-house counsel for American Telephone and Telegraph Company ("AT&T") who are actively engaged in the conduct of this litigation; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in the litigation; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to Commission officials involved in this litigation (including court reporters, persons operating audio or video recording equipment at depositions, and any special master appointed by the Commission.[1] Subject to the provisions of subparagraph (c) below, such documents may also be disclosed:

(a) to any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper; and

(b) in the event the Commission orders that depositions may be taken, to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify to outside consultants or experts retained for the purpose of assisting counsel in the litigation; to employees of parties involved solely in one or more aspects or organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions; provided, however, that in all such cases the individual to whom disclosure is to be made has signed a form containing: (1) a recital that the signatory has read and understands this order; and (2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents is prohibited.

(c) Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to who the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten-day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Commission has denied such motion.

3. *Declassification.* A party (or aggrieved entity permitted by the Commission to intervene for such purpose) may apply to the Commission for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of

[1] Disclosure may not be made to counsel involved in any related litigation between the parties pending before the Commission or in courts, except upon specific Commission approval.

confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

4. *Confidential Information of Non-Parties.* AT&T represents that it has certain contractual and regulatory obligations to protect the confidentiality of documents or information provided to it by non-parties to this proceeding. Accordingly, any party who receives notification pursuant to paragraphs 2(c) or 3 above may notify non-parties of the proposed disclosure or declassification of confidential documents or information provided by or pertaining to such non-parties. Neither party shall oppose the right of such non-party to appear before, or to file a submission with, the FCC in order to object to the proposed disclosure or declassification. Provided, however, that both parties retain the right to assert any and all grounds either for or against the proposed disclosure or declassification.

5. *Confidential Information in Depositions.* In the event the Commission orders that depositions may be taken in this proceeding:

(a) A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 2(c) above are complied with. Deponents shall not retain or copy portions of the transcripts of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 2(b) above. A deponent who is not a party or a representative of a party shall be ' furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within fifteen (15) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential-subject to protection pursuant to Commission Order." Until expiration of the 15-day period, the entire deposition will be treated as subject to protection against disclosure under this order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

6. *Confidential Information Filed in the Record.* Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in evidence at any Commission hearing, or in the record made by the parties and submitted to the Commission in this proceeding, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Commission for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Commission will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information in the proceeding.

7. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of stamped confidential documents which a party has obtained under terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

8. *Filing.* Stamped confidential documents need not be filed with the Commission's Secretary except when required in connection with motions under Sections 1.727 or 1.730 of the Commission's rules and regulations or other matters pending before the Commission. If filed, they shall be filed under seal and shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.

9. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 2(b) and (c) above.

10. *Prohibited Copying.* If a document contains information so sensitive that it should not be copied by anyone, it shall bear the addition legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel so designating the document.

11. *Use.* Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and the conduct of this litigation (including appeals), and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.

12. *Non-Termination.* The provisions of this order shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, stamped confidential documents and all copies of same (other than exhibits of record, if any) shall be returned to the party or person which produced such documents, or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

13. *Modification Permitted.* Nothing in this order shall prevent any party or other person from seeking modification of this order or from objecting to discovery that it believes to be otherwise improper.

14. *Responsibility of Attorneys.* The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing at the Commission under seal.

15. This Order is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints &
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Authority to
Issue Subpoenas

ORDER

Adopted: November 19, 1993; Released: December 17, 1993

By the Commission:

1. Section 409(e) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 409(e), grants the Commission express authority to require by subpoena information relating to any matter under investigation. This authority may be delegated in accordance with Section 5(c)(1) of the Act, 47 U.S.C. §155(c)(1). Subpoenas may be issued to, among others, private entities not subject to an administrative agency's jurisdiction.[1]

2. We find that the delegation of authority to the Chief, Field Operations Bureau, to issue administrative subpoenas in the investigations of cases involving a violation or violations of Sections 301 (unlicensed operation) or 302a (illegal marketing of radiofrequency devices capable of causing harmful interference) of the Act, 47 U.S.C. §§ 301 and 302a, will facilitate investigations of illegal activity and, therefore, is in the public interest.

3. ACCORDINGLY, IT IS ORDERED, that, pursuant to Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), authority is delegated to the Chief, Field Operations Bureau to require by administrative subpoena the production of books, papers, correspondence, memoranda, and other records deemed relevant to the investigation of an alleged violation or violations of Sections 301 or 302a of the Act, 47 U.S.C. §§ 301 and 302a.

4. IT IS FURTHER ORDERED that Section 0.311 of the Commission's rules, 47 C.F.R. § 0.311, be amended to add a subsection (f) to reflect this delegation of authority. This amendment of the Commission's rules is contained in Appendix A of this Order. The requirement for notice and comment rule making contained in 5 U.S.C. § 553(b) and the effective date provisions of 5 U.S.C. § 553(d) do not apply since this amendment concerns matters of agency organization, procedure, or practice. See 5 U.S.C. §§ 553(b)(A), 553(d).

5. IT IS FURTHER ORDERED THAT this amendment of Section 0.311 as set forth in the Appendix is EFFECTIVE upon the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Title 47 of the Code of Federal Regulations, Part O, is amended as follows:

Part O

1. Authority for Part O of Title 47 of the Code of Federal Regulations continues to read as follows:

Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155

2. Section 0.311 is amended by adding subsection (f) to read as follows:

Field Operations Bureau

§ 0.311 Authority Delegated

* * * * *

(f) The Chief of the Field Operations Bureau is authorized to issue subpoenas for the production of books, papers, correspondence, memoranda, and other records deemed relevant in the investigation of an alleged violation or violations of Sections 301 (unlicensed operation) or 302a (illegal marketing of radiofrequency devices) of the Communications Act of 1934, as amended.

[1] *See FCC v. Cohn*, 154 F. Supp 899 (S.D.N.Y. 1957).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Quick Technology Corporation
Irvine, California

NAL/ACCT NO. 315LA0004

ORDER

Adopted: December 9, 1993; Released: December 17, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Quick Technology Corporation (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's November 13, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302(b) (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. As explained below, we are cancelling the monetary forfeiture penalty.

II. BACKGROUND

2. Our records show that on September 14, 1992, an FCC inspector visited Petitioner's place of business in Irvine, California. He observed a class B-type computer that had no FCC ID. There was no evidence present that the computer, which was being offered for sale, had been certified as required by Section 15.101 of the Commission's Rules, 47 C.F.R. § 15.101. A Notice of Apparent Liability For Monetary Forfeiture was issued to Petitioner on October 13, 1992. Petitioner replied by letter dated October 23, 1992.

3. The October 23, 1992, reply included extensive information to support Petitioner's contention that the computer observed at its place of business was, in fact, certified. Petitioner stated that the FCC identifier of JTHQUICK32000SER and the designation on the grant document of "tower" computer were applicable to the computer observed at their location. Investigatory staff at the responsible local FCC office considered the observed computer to be a "mini" tower type. Upon review of the response, the Forfeiture Order was issued at the full $7,000 value.

4. Petitioner claims it should not be subject to a monetary forfeiture penalty because the Commission made no distinction according to tower height in authorizing a "tower" type computer, and the Petitioner held an authorization for a tower computer.

III. DISCUSSION AND CONCLUSION

5. We agree with Petitioner. The term "tower computer" on the FCC equipment authorization does not distinguish between midi or mini tower heigths. The term, therefore, can be said to include any tower size.

6. For the reasons stated above, the $7,000 forfeiture is canceled.

V. ORDERING CLAUSES

7. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by Quick Technology Corporation is GRANTED and the monetary forfeiture is canceled. 47 C.F.R. § 1.106.

8. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return-receipt requested, to Quick Technology Corporation, 1642 McGaw Avenue, Irvine California, 92714.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORIONNET, INC. File No. I-T-C-93-191

Application for authority pursuant to Section 214 of the Communications of 1934, as amended, to provide private line services between the United States and various points and to acquire facilities from Comsat to provide service to various overseas points.

ORDER AND CERTIFICATION

Adopted: December 1, 1993; Released: December 17, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require authorization for OrionNet, Inc. (OrionNet) to provide the services set forth below.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-191 IS GRANTED and OrionNet is authorized to:

a. resell international private lines under the tariffs of AT&T (F.C.C. Tariff Nos. 1, 2, 4, 9, 11 and 12), MCI (F.C.C. Tariff No. 1), Sprint (F.C.C. Tariff Nos. 1 and 2), WorldCom (F.C.C. Tariff No. 1) and FTCC (F.C.C. Tariff No. 15) for the provision of international private line service not interconnected to the public switched network between the United States and international points listed in Appendix A;[1]

b. lease from Comsat and operate the facilities set forth in Appendix B between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Atlantic Ocean;

c. lease and operate necessary domestic connecting facilities; and

d. use the facilities in b and c above to provide OrionNet's regularly authorized services including switched voice service, between the U.S. and the points listed in Appendix B.

3. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

4. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

5. IT IS FURTHER ORDERED that OrionNet shall file publicly:

(a) tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules 47 C.F.R. Part 61; or

(b) a copy of any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*.

6. IT IS FURTHER ORDERED that our authorization of OrionNet to provide private line service as part of its regularly authorized services via INTELSAT is limited to the provision of such private line service only between the United States and any point listed in Appendix B -- that is, private lines which originate in the United States and terminate in any point listed in Appendix B or which originate in any point listed in Appendix B and terminate in the United States. In addition, OrionNet may not -- and OrionNet's tariff must state that OrionNet's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign point affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

7. IT IS FURTHER ORDERED that neither OrionNet nor any persons or companies directly or indirectly controlling or controlled by OrionNet, or under direct or

[1] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemkaing)* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).

indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which OrionNet or any persons or companies controlling or controlled by OrionNet are parties.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	No. of 64 kbps circuits
Albania	25
Algeria	25
Austria	25
Belarus	25
Belgium	25
Bosnia	25
Bulgaria	25
Canada	25
Croatia	25
Czech Republic	25
Cyprus	25
Denmark	25
Estonia	25
Finland	25
France	25
Georgia	25
Germany	25
Greece	25
Greenland	25
Hungary	25
Italy	25
Latvia	25
Liechtenstein	25
Lithuania	25
Luxembourg	25
Macedonia	25
Malta	25
Mexico	25
Morocco	25
Norway	25
Poland	25
Portugal	25
Romania	25
Russia	25
Slovakia	25
Slovenia	25
Spain	25
Switzerland	25
Tunisia	25
Turkey	25
Ukraine	25

APPENDIX B

INTELSAT FACILITIES

Country	No. of Voice-grade Circuits
Albania	25
Algeria	25
Belarus	25
Bosnia	25
Canada	25
Croatia	25
Georgia	25
Macedonia	25
Mexico	25
Morocco	25
Russia	25
Slovakia	25
Slovenia	25
Tunisia	25
Ukraine	25

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT Corporation File No. ITC-93-266

For Authority to Interconnect INMARSAT Facilities with the Internet Facilities of the National Aeronautical and Space Administration

ORDER AND AUTHORIZATION

Adopted: December 3, 1993; Released: December 17, 1993

By the Chief, International Facilities Division:

1. Comsat Corporation (COMSAT), through its COMSAT Mobile Communications division, requests authorization pursuant to Sections 752(c) and 753(c) of the International Maritime Satellite Telecommunications Act, 47 U.S.C. §§ 752, 753, and Section 214 of the Communications Act of 1934, 47 U.S.C. §214, to interconnect its INMARSAT satellite communications facilities with the Internet[1] facilities of the National Aeronautics and Space Administration (NASA), in order to allow the exchange of information between ship earth stations using the INMARSAT system and the users of the Internet computer network. No comments were filed in response to public notice of this application.

2. COMSAT and NASA plan to interconnect their facilities to permit the exchange of information between INMARSAT ship earth stations and U.S. government and other Internet users that conform to the National Science Foundation's (NSF) "Acceptable Use Policy." NSF limits access to its Internet computer network to research, education and non-commercial purposes. NASA will interconnect its Internet network facilities with COMSAT's telephony switching facilities located at its land earth station in Santa Paula, California (KA-31) through a NASA-provided T1 line from NASA's Ames Research Center near San Francisco. This interconnection will allow exchange of information among Internet users in the Atlantic (East and West), Indian and Pacific Ocean regions of the INMARSAT system via COMSAT"s existing INMARSAT land earth stations serving those regions. Details regarding operating procedures will be submitted as information submissions to the Commission upon their execution. The estimated cost to COMSAT for procurement, configuring and programming its system to accommodate this interconnection will be $180,000.

3. We find that the public convenience and necessity will be served by grant of this application. Accordingly, IT IS ORDERED that application File No. ITC-93-266 IS GRANTED, and COMSAT is AUTHORIZED, pursuant to 47 U.S.C. §§ 214, 752 and 753, to interconnect INMARSAT facilities with the Internet facilities of NASA as set forth in the subject application.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] Internet is a collection of collaborating public and private computer networks that includes the U.S. federal government, international organizations, and domestic and foreign universities and research organizations. The Internet network facilitates the exchange of electronic mail and data files among thousands of users of its affiliated computer networks throughout the world.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NorLight, Inc. File No. I-T-C-93-257

Application for Authority Pursuant
to Section 214 of the
Communications Act, as Amended to
Resell Telecommunications Services
of Other Common Carriers to
Provide Private Line Services from
the United States to International
Points

ORDER AND AUTHORIZATION

Adopted: November 19, 1993; Released: December 17, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by NorLight, Inc. (NorLight) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the resale of international private lines for the provision of private line services to the general public by NorLight.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-257 IS GRANTED and NorLight is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line services[1] between the United States and Canada and the United States and Mexico,[2] as specified in Appendix A.

3. IT IS FURTHER ORDERED that NorLight is authorized to lease and operate one-half interest in up to 4 DS-O circuits pursuant to RCI's Tariff FCC No.2, TRT's Tariff FCC No. 14, and MCI's Tariff FCC No.27 for the provision of private line service by the resale of international private lines not interconnected to the public switched network, as specified in Appendix A.[3]

4. IT IS FURTHER ORDERED that neither NorLight nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which NorLight or any person or companies controlling or controlled by NorLight are parties.

5. IT IS FURTHER ORDERED that our authorization of NorLight to resell international private lines for the provision of non-interconnected private line service is limited to the provision of such private line service only between the United States and Canada and the United States and Mexico -- that is, private lines which carry traffic that originates in the United States and terminates in either Canada or Mexico, or originates in either Canada or Mexico and terminates in the United States. In addition, NorLight may not -- and NorLight's tariffs must state that NorLight's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Third Further Notice*), 7 FCC Rcd 7927 (1992), *fONOROLA Corporation and EMI Communications Corporation* (*fONOROLA/EMI Order*), 7 FCC Rcd 7312 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Third Further Notice* in *Regulation of International Accounting Rates*, CC Docket 90-337, and any other related proceedings.

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[1] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the public switched network through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

[2] *See* October 8, 1993 Supplement to Application. We note that should Norlight obtain any interest in facilities beyond the international points herein authorized for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of lines under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for Norlight to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[3] *See* October 8, 1993 Supplement to Application.

7. IT IS FURTHER ORDERED that NorLight shall file tariff provisions pursuant to Section 203 of the Communications Act of 1934, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized herein.

8. IT IS FURTHER ORDERED that NorLight shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Communications Act, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that NorLight shall file semi-annual reports of circuit additions, pursuant to Section 63.15 of our Rules, 47 C.F.R. §63.15.

10. IT IS FURTHER ORDERED that NorLight shall file with the Commission a copy of any operating agreement entered into with its foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

11. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services NorLight seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

12. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	DS-O Circuit Requirements
Non-interconnected Private Lines for Private Line Service	
Canada	3
Mexico	1

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 7, 1993

Released: December 20, 1993

In reply, refer to:
315LR0004

Gerard B. Van Wart, Esq.
P.O. Box 795
Hampton Bays, NY 11946

Dear Mr. Van Wart:

This is in response to your July 1, 1993, letter concerning the matter of the monetary forfeiture bearing the account number 315LR0004 issued to the Shinnecock Fishermen's Cooperative Association, Inc., (SFCAI). Your letter requested that the matter be reviewed at a higher level.

In the maritime mobile service, ship stations are authorized to transmit on any frequency that is listed in Part 80 of the Commission's Rules that falls within the frequency band authorized by the station's license. On the other hand, coast stations (stations on land that communicate with ship stations) are authorized to use *only* the frequencies listed on their station licenses. We note that SFCAI has a license for a limited coast station with an assigned call sign of WHW853. That license authorizes operation only on 4126.4 and 6517.4 kHz. The station was operated on 5664.0 kHz, a frequency allocated internationally to the aeronautical mobile radio service and not authorized for use by ship or coast stations. Operation on any frequency not listed on the station license is not authorized under the terms of that station license and, therefore, is considered to be unlicensed operation.

Your letters responding to the Notice of Apparent Liability (NAL) and the Notice of Forfeiture (NOF) fail to outline what steps your client has taken (if any) to prevent continued operation of their station on frequencies not authorized under the terms of their station license. If no corrective action has been taken, please so state. You are requested to provide that information in a response to this letter.

Section 80.153(b) of the Commission's Rules specifies that coast radiotelephone stations operating on frequencies below 30 MHz with power of 1500 watts peak envelope power or less may be operated only by a person holding either a first, second, or third class radiotelegraph operator's certificate, a general radiotelephone operator license, or a marine radio operator permit. According to information contained in the NAL, the operator of the station at the time of the violation was determined to be an SFCAI employee named "Butch" Hoffman. No information was provided in your responses to confirm that operator Hoffman meets the requirements of Section 80.153(b) of the Commission's Rules. Therefore, you are requested to provide the following in a response to this letter:

1. SFCAI employee "Butch" Hoffman's full name and date of birth.

2. The class, serial number, and issuance date of his radio operator authorization. The various classes of radio operator authorizations are listed in Section 80.151 of the Commission's Rules, a copy of which is enclosed.

3. If Mr. Hoffman has no radio operator authorization, please provide a statement to that effect.

4. If neither Mr. Hoffman nor other SFCAI employees who operate WHW853 possess appropriate radio operator authorizations, advise what steps are being taken by your client to comply with the provisions of Section 80.153 of the Rules.

The above information is requested in accordance with Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), a copy of which is enclosed. Please respond within 30 days from the date of this letter. Failure to respond could result in the imposition of another forfeiture.

A review of the information provided with your request for review leaves us unpersuaded that your client is unable to pay a forfeiture. However, the Commission has recently reviewed and revised its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on the fact that there is no record of prior violations of this type by your client, we are reducing the forfeiture amount to $4,000.

Your client is ordered to pay $4,000. This amount is due immediately and must be paid within 30 days of the date of receipt of this letter.[1] It should be paid by check or money order made payable to the Federal Communications Commission and sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 315LR0004 on the remittance.

It is further ordered that you or your client provide the information concerning theradio operator and transmitter operating corrections requested above. Send that information to:

[1] Any correspondence concerning forfeiture payments, including any request to make payment in installments, should be sent to: Debt Collection Officer, Attention: NAL/Acct. No. 315LR0004, Federal Communications Commission, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554.

Chief, Legal Branch
Field Operations Bureau, Stop Code 1500E3
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Failure to provide the requested information within 30 days of the date of receipt of this letter may result in assessment of another monetary forfeiture, revocation of your client's station license, or both.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 8, 1993

Released: December 20, 1993

Stanley L. Marcus
414 Bayside Road
Bellingham, WA 98225

Dear Mr. Marcus:

This is in response to your letter dated October 7, 1992, wherein you requested reconsideration of the Notice of Forfeiture bearing the account number 215FE0195. The forfeiture had been issued for operating the radio station aboard your boat, PARAPHERNALIA, after its station license had expired.

Section 80.405(c) of the Commission's Rules states in part: "... The current station authorization or a legible photocopy must be posted at the principal control point of each station...". All ship station licenses are plainly marked with the license expiration date. If the station license had been conspicuously posted at the radio operating position as required by the rules, it should have been obvious to the operator that the license had expired.

If the licensee of a radio station submits a renewal application prior to the expiration date of the station license, the station may continue to be operated until the Commission completes action on the renewal application. However, if the renewal application is not submitted until after the license has expired, the radio cannot be operated until after the Commission completes action on the application and issues a new (or reinstated) station authorization. Therefore, your operation of the radio after the license had expired and before a renewal application was submitted resulted in unlicensed operation.

The unlicensed operation was considered to be willful not because you specifically intended to engage in unlicensed operation, but because the operation itself was a conscious act. You placed the transmitter on the air intentionally because you intended to communicate. The transmitter was not accidentally activated due to a defective on-off switch or other technical defect.

Section 312(f)(1) of the Communications Act defines a willful violation as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act ...". 47 U.S.C. § 312(f)(1). *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

The Commission considers unlicensed operation to be a serious matter. Although operating after expiration of a license is not as serious as operating a station that has never been licensed, it is, nevertheless, a matter that cannot be overlooked. However, the Commission has recently reviewed and revised its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on the new standard and the fact that we have no record of prior violations on your part, we are reducing the forfeiture amount to $100.

You are ordered to pay $100. The forfeiture should be paid by check or money order made payable to the Federal Communications Commission and sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 215FE0195 on the remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-352

In Re Applications of

Eunice Wilder and Sheridan Broadcasting Corporation d/b/a WEYBURN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-851213MN
WKIE-FM, INC.	File No. BPH-851216OA
BARBARA B. BENNS	File No. BPH-851216ON
JAMES RIVER COMMUNICATIONS CORPORATION	File No. BPH-851216OO
FUTURE BROADCAST LIMITED PARTNERSHIP	File No. BPH-851216OV

For a Construction Permit for a New FM Station on Channel 266A, (101.1 MHz), in Richmond, Virginia.

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1993; Released: December 20, 1993

By the Commission: Chairman Hundt not participating.

1. On February 12, 1993, in *Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993), the Court of Appeals remanded this case to the Commission for further proceedings relative to the financial qualifications, possible misrepresentation and real party-in-interest of James River Communications Corporation (James River). Pursuant thereto, the Commission's Office of General Counsel requested comments from all the parties to this proceeding as to what further action should be taken in response to the court's remand.[1]

I. FINANCIAL QUALIFICATIONS

2. The Court of Appeals held that the evidentiary record in this case was insufficient to resolve the financial qualifications issue in favor of James River by summary decision and that a hearing should have been held. *Weyburn Broadcasting Ltd. Partnership v. FCC*, 984 F.2d at 1229-32. In responding to the court's remand, all the commenting parties recommend that the financial qualifications issue previously designated by the Review Board be given further consideration before the ALJ. See *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861 (Rev. Bd. 1990). We agree, and accordingly, we will remand on that issue to determine whether James River has been financially qualified to be a licensee throughout the course of this proceeding.

3. James River submits that no additional discovery is necessary to resolve the financial issue and asks that we simply direct the ALJ to retry the issue. We disagree. The court stated that, "[T]he ALJ put restraints on discovery that ensured the impossibility of adequately addressing the financial qualification issues." *Weyburn Broadcasting Ltd. Partnership*, 984 F.2d at 1231. Thus, we direct the ALJ to conduct a full hearing and respond to all discovery requests in accordance with applicable law, rules, policy and precedent.

4. The court concluded that no determination could be made as to whether the requirements of 47.C.F.R. § 1.65 for disclosure of pertinent financial information had been met because a full airing of the financial issue never occurred. See *Weyburn Broadcasting Ltd. Partnership v. FCC*, 984 F.2d at 1231. Consequently, we are also remanding for further hearing on the Section 1.65 reporting issue which had also been designated by the Board.

II. MISREPRESENTATION

5. Benns requests that an issue be designated to determine whether the James River principals misrepresented facts or were lacking in candor. James River objects to this response to the court's decision as overly broad. In reply, Weyburn asserts that the court's opinion requires a general misrepresentation/lack of candor issue. We agree with James River. The court's discussion of questions relating to possible misrepresentations by James River all center around the notation on the stock certificates that they were "fully paid and non-assessable" when issued, when there was evidence that they were not paid for, and the court's observation that Ms. Claudette McDaniel, a principal in James River, told three significantly different and conflicting stories regarding the payment for her stock. *Weyburn Broadcasting Ltd. Partnership v. FCC*, 984 F.2d at 1232. We find nothing in the court's opinion that would warrant a general misrepresentation/lack of candor issue. Thus, consistent with the court's opinion, we will limit the misrepresentation issue to the matters noted by the court pertaining to Ms. McDaniel's testimony involving the stock certificates.

III. REAL PARTY-IN-INTEREST

6. The court ruled that, because of questions concerning the role of James River's non-voting stockholder, Robert Fish, an adequate appraisal of the financial qualifications and misrepresentation issues necessitates a hearing on a real party-in-interest issue. *Weyburn Broadcasting Ltd. Part-*

[1] Comments and related pleadings filed in response to OGC's request are as follows: (a) Comments of Barbara B. Benns (Benns) filed May 26, 1993; (b) Comments Pursuant to Order filed June 1, 1993 by Weyburn Broadcasting Limited Partnership (Weyburn); (c) Comments filed June 1, 1993 by James River; (d) Consolidated Reply Comments filed June 4, 1993 by Benns; (e) Reply Comments filed June 7, 1993 by James River and (f) Reply Comments filed June 8, 1993 by Weyburn.

nership v. FCC, 984 F.2d at 1234. Thus, an issue will be designated to determine whether Fish has become the real party-in-interest in the James River application.[2]

IV. OTHER MATTERS

7. Benns requests the designation of an issue to determine whether there has been an unauthorized transfer of control of James River from Ms. McDaniel to Fish. The designation of such an issue goes beyond the scope of the court's remand. The court did not raise that question and Benns' comments do nothing more than include the issue along with the other issues requested, without explanation or support of any kind. Accordingly, no unauthorized transfer of control issue will be designated.

8. James River argues that Benns' request that this proceeding be assigned to a new ALJ should be denied. Although we do not interpret Benns' request that this proceeding be remanded "to the ALJ or another ALJ" as a request for reassignment of this case, we agree with James River that there " is no basis in the matters before us to warrant consideration of a change in the presiding officer.

9. Finally, we agree with James River and Weyburn that the public interest would be served by expediting this matter and despite Benns' contention to the contrary, we will further direct that any exceptions to the ALJ's Supplemental Initial Decision be filed directly with the Commission.

10. ACCORDINGLY, IT IS ORDERED, That the proceeding IS REMANDED to the Presiding Officer for the expeditious adduction of additional evidence and preparation of a Supplemental Initial Decision on the issues previously designated by the Review Board, 5 FCC Rcd at 863 ¶ 11, as well as the following additional issues:[3]

(a) To determine whether Claudette McDaniel made misrepresentations or was lacking in candor with the Commission with respect to testimony concerning her acquisition and payment for stock in James River, and, if so, the effect thereof on James River's basic qualifications to be a Commission licensee; and

(b) To determine whether Robert E. Fish is the real party-in-interest in the application of James River Communications Corporation; and

(c) To determine whether, in light of the evidence adduced under the foregoing issues, James River Communications Communications Corporation possesses the requisite qualifications to be a Commission licensee.

11. IT IS FURTHER ORDERED, That any exceptions to the ALJ's Supplemental Initial Decision SHALL BE FILED directly with the Commission.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[2] In this regard, Weyburn is correct that the evidence adduced under this issue, even if not disqualifying, could affect the integration credit to be awarded James River to the extent that Fish has been actively involved in the applicant's affairs. See *Evansville Skywave, Inc.*, 7 FCC Rcd 1699 (1992).

[3] The ALJ is also authorized to modify the comparative analysis of his Initial Decision, 4 FCC Rcd 5310 (ALJ 1989), if warranted by the evidence adduced during the further hearing proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-303

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Hazelton and
Williamsport, Pennsylvania
in the Wilkes-Barre-Scranton,
Pennsylvania Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: December 21, 1993

Comment Date: January 18, 1994
Reply Comment Date: February 2, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed August 3, 1993, by Diversified Communications, the licensee of television station WYOU(TV), Scranton, The New York Times Company, licensee of television station WNEP-TV, Scranton, and WBRE Associates, licensee of television station WBRE-TV, Wilkes-Barre, Pennsylvania, (collectively "Petitioners"), to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to add the communities of Hazelton and Williamsport, Pennsylvania, to the Wilkes-Barre-Scranton, Pennsylvania television market. *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).[1]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[2]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[3] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. According to the petitioners, the Wilkes-Barre-Scranton television market includes commercial stations WYOU(TV), Channel 22 (CBS); WNEP-TV, Channel 16 (ABC); and WOLF-TV, Channel 38 (Fox), Scranton;[4] WBRE-TV, Channel 28 (NBC), Wilkes-Barre; WWLF(TV), Channel 56, Hazelton; and WILF-TV, Channel 53, Williamsport, Pennsylvania.[5] Both the Hazelton and Williamsport stations operate as satellite stations of WOLF-

[1] The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.150 (1993).

[2] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[3] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] The petitioners report that there is also an outstanding construction permit for Channel 64 in Scranton.

[5] The petitioners also note that Channel 20 is allocated to Williamsport, although a station on that channel is not operating. However, they state that economic reality dictates that "any station in Williamsport must have Williamsport added as a designated community in the . . . market in order to have any chance for success."

TV. The petitioners further state that their stations all provide Grade A signal-strength service to Hazelton, and, although Williamsport is encompassed by the Grade B signal contours of WYOU and WBRE-TV, but falls "slightly beyond" the Grade B signal of WNEP-TV, all three stations operate translators which provide "strong off-air service" to Williamsport. They further note that the Grade B signal contours of the Hazelton and Williamsport stations substantially overlap with those of the other market-area stations. They maintain that WYOU, WNEP-TV and WBRE-TV "provide virtually all off-air viewing and a preponderance of cable viewing in Hazelton and Williamsport.

6. The petitioners maintain that substantial portions of the area comprising the subject ADI are beyond the composite 35-mile zones centered on Scranton and Wilkes-Barre. Thus, they assert, while commercial stations licensed to communities within the market have "must-carry" status in the ADI (which includes Luzerne and Lycoming Counties where Hazelton and Williamsport are situated), the petitioners' stations may be considered "distant signals" for copyright purposes in at least some of these areas.[6] The petitioners argue that amendment of Section 76.51 to include both Hazelton and Williamsport as designated communities in the Wilkes-Barre-Scranton market is necessary to ensure that the 1992 Cable Act's must-carry provisions, which rely on ADIs in order to reflect true marketplace conditions, function as anticipated. "Otherwise, a substantial number of cable subscribers within the market may be unable to view the local stations because potential copyright liability will make their carriage unattractive and prohibitively expensive."

7. The petitioners also allege that the factors previously considered by the Commission in evaluating proposed amendments to Section 76.51 of the Rules justify the action requested here. In this regard, they state that Hazelton is 20 air miles from Wilkes-Barre and 35 air miles from Scranton; Williamsport is 59 air miles from Wilkes-Barre and 71 air miles from Scranton -- distances within the range previously considered favorably by the Commission in such cases. The petitioners contend that the stations would not be granted significantly expanded cable carriage rights beyond their Grade B signal contours,[7] but also contend that this factor is "seriously eroded" by the 1992 Cable Act's must-carry rules. Specifically, they allege that because these stations' must-carry rights are derived from their location in the Wilkes-Barre-Scranton ADI -- not from the proposed hyphenation -- the addition of Hazelton and Williamsport as designated communities in Section 76.51 of the Rules will not increase the stations' carriage rights beyond that which the Rules already permit.

8. The petitioners further assert that their stations serve the needs and interests of the viewers of Northeastern and Central Pennsylvania (encompassing Hazelton and Williamsport). They point out that television viewing in Hazelton and Williamsport is dominated by the Wilkes-Barre-Scranton stations,[8] and focus much of their local news coverage on events relevant to those areas. They note that WYOU maintains news bureaus in both Luzerne and Lycoming Counties; airs, on its Williamsport low-power station, twice-daily newsbreaks focusing solely on events in the Williamsport community; and regularly airs live reports from Hazelton and Williamsport on news, sports and other events. They state that WNEP-TV and WBRE-TV also provide extensive news coverage of both Hazelton and Williamsport, with the latter station maintaining a Williamsport News Bureau, with a two-person, full-time staff and dedicated microwave link to its main studio. The petitioners allege that this type of coverage reflects the common ties among the four communities, which are part of the same Congressional District and are historically linked by the local mining and lumber industries. The petitioners believe that these facts demonstrate that all market stations are interdependent on all four market communities for viewers and economic support. Amendment of Section 76.51, in their view, will remove any copyright constraints that might otherwise inhibit carriage of market stations throughout the ADI, placing all market-area stations on an equal competitive footing for cable access throughout the ADI in a manner consistent with both the Commission's approach to market hyphenations and the 1992 Cable Act's reliance on ADIs to be reflective of true market conditions.

DISCUSSION

9. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the

[6] Stations licensed to communities specifically designated in Section 76.51 of the Rules are generally considered "local signals" for copyright purposes for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Hazelton and Williamsport as designated communities in this market generally results in the petitioners' stations being classified as "distant signals" for market-area systems more than 35 miles from Scranton and Wilkes-Barre, the designated communities in this market as listed in Section 76.51. The addition of Hazelton and Williamsport as designated communities in this market would therefore essentially entitle petitioners' stations to additional "local signal" status for market-area cable systems within 35 miles of those communities. Moreover, under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

[7] The petitioners assert that the fact that Williamsport falls slightly outside the Grade B signal contour of WNEP-TV is not significant. Citing the Commission's *Report and Order* in MM Docket No. 84-111 (Melbourne and Cocoa, Florida), 57 RR 2d 685, 691 (1985), the petitioners state that the Commission has previously recognized "that portions of a single television market are occasionally' located beyond the Grade B contours of some market stations." Moreover, these petitioners point out that each station employs translators and low-power stations to increase coverage to the Hazelton and Williamsport areas.

[8] The petitioners submit that Arbitron surveys reveal the "indisputable television market connection" between the subject communities, with market stations obtaining a 99% viewing share in non-cable homes and a 70% viewing share in cable homes in Luzerne County (where Hazelton is located), and a 94% share in non-cable homes and 59% share in cable homes in Lycoming County (where Williamsport is located).

television stations licensed to Wilkes-Barre, Scranton, Hazelton and Williamsport do compete for audiences and advertisers throughout much, if not all, of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole.[9] Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

11. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 18, 1994,** and reply comments on or before **February 2, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

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[9] In this regard, we note that the Hazelton and Williamsport stations are presently operating as satellites of WOLF-TV, Scranton and that, to some degree, the petitioners rely on low-power and translator stations to demonstrate service to these communities. Due to the secondary nature of low-power and translator service, these factors of themselves are not necessarily a conclusive indication of service provided to a particular community. However, the Commission has stated that it will not restrict the types of evidence parties may submit to demonstrate the propriety of a market adjustment because each case will be unique to the ' individual factual situation presented. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977. Accordingly, our conclusion to proceed to a proposed rulemaking in this case is based on the totality of factors which tend to indicate that stations in the Wilkes-Barre-Scranton market are genuinely competitive with one another throughout the combined service area. Nevertheless, interested parties are free to direct comment to this aspect of the particular factual situation presented here.

Additional Information

13. For additional information on this proceeding, contact Alan E. Aronowitz, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-304

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Anaheim, California
in the Los Angeles-San
Bernardino-Corona-Fontana-
Riverside, California,
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: December 21, 1993

Comment Date: January 18, 1994
Reply Comment Date: February 2, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed July 20, 1993, by Golden Orange Broadcasting Co., Inc. ("Golden Orange"), licensee of television station KDOC-TV, Channel 56 (Independent), Anaheim, California, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to the add community of Anaheim as a designated community in the Los Angeles-San Bernardino-Corona-Fontana-Riverside, California, television market.[1] *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).[2]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[3] Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[4] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act.

THE PETITION

4. According to Golden Orange, Anaheim is an integral part of the Los Angeles television market; the center of Anaheim is located approximately 21 miles from the center of Los Angeles -- in contrast to Corona and Fontana, which are, respectively, 38 and 44 miles from the center of Los Angeles.[5] The petitioner states that Anaheim's 35-mile exclusivity protection zone[6] is virtually encompassed within the combined 35-mile zones of San Bernardino, Corona and Fontana, with the result that a smaller market for purpose of Section 76.51 is wholly contained within a major television market. Further, it asserts that KDOC-TV's Grade B signal contour encompasses all of the des-

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[1] By *Report and Order* in MM Docket No. 93-207, DA 93-1444 (released December 7, 1993), Section 76.51 was amended to add Riverside, California, as a designated community in the subject hyphenated market.

[2] The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977-78, n.150 (1993).

[3] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[4] Cable Television Consumer Protection and Competition Act , Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] Referencing the request underlying the action in MM Docket No. 93-207, *see* note 1, *supra*, the petitioner also notes that Riverside, California, is 48 miles from the center of Los Angeles.

[6] Section 73.658(m) of the Commission's Rules generally provides that a television station may obtain exclusivity in non-network programming against other stations located in communities within 35 miles and, for the top 100 markets, those licensed to designated communities in a hyphenated market specified in Section 76.51.

ignated communities in the market and is similar to the Grade B contours of other market-area stations,[7] indicating that the station competes for audience and revenue in virtually the same area as stations licensed to those communities.

5. Golden Orange contends that despite the competitive makeup of the market, because Anaheim is not a designated community in the Section 76.51 market listings, KDOC-TV is not considered a "local" signal throughout the Los Angeles ADI. Specifically, it states that while stations licensed to communities designated in Section 76.51 are considered local for cable systems within the 35-mile zones of all listed communities in a given hyphenated market, the absence of Anaheim as a designated community in this market results in KDOC-TV's classification as a "distant" signal for market-area systems more than 35 miles from Anaheim -- placing KDOC-TV at a substantial competitive disadvantage to other stations for cable carriage of its signal without incurring distant signal copyright liability.[8] Amendment of Section 76.51 as requested is essential, it maintains, to permit KDOC-TV to compete effectively against other market stations, and will benefit the public "by access to KDOC-TV's independent, foreign language and other minority programming."

6. Community Cablevision Company (CCC), a California corporation doing business as Dimension Cable Services, operator of a cable system serving subscribers within the subject market, filed an opposition to Golden Orange's proposal. CCC also filed with the Commission, on May 28, 1993, a Petition for Emergency Special Relief seeking to exclude a number of broadcast stations, for must-carry purposes, from certain communities in the Los Angeles area. KDOC-TV is not one of the stations referenced in CCC's special relief petition, but in its opposition to Golden Orange's instant request, CCC maintains that "including Anaheim in the Los Angeles hyphenated television market would only make it easier for KDOC to obtain must-carry rights in communities throughout the Los Angeles area by relieving it of its obligation to indemnify cable systems of the copyright liability that would otherwise be incurred as a result of its carriage." *See* Section 76.55(c)(2) of the Commission's Rules. CCC asserts that increasing the number of must-carry signals in this market is both an "overwhelming burden" due to the large number of potential must-carry stations in the market, and a "corresponding diminution of [its] editorial discretion . . . [and its] . . . First Amendment rights."

DISCUSSION

7. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that KDOC-TV and stations licensed to designated communities in the television market as listed in Section 76.51 of the Rules do compete for audiences and advertisers throughout much of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

8. In this regard, CCC's allegations do not compel a contrary conclusion. As an initial matter, CCC's pleading is unauthorized.[9] Moreover, KDOC-TV is not one of the stations referenced in CCC's special relief petition. Although CCC's petition is directed to the must-carry status of certain stations regarding specific communities and certain systems and certain systems within the subject ADI, Golden Orange's petition is instead directed to the copyright status of KDOC-TV *if* the station is carried by market-area systems within the ADI it already is entitled to carriage in. Thus, any action to amend Section 76.51 of the Rules as proposed is, in our view, without prejudice to CCC's efforts to defeat the must-carry status of stations on certain systems within the subject ADI.[10] As to CCC's specific allegations regarding its "burden" regarding the potentially large number of potential must-carry stations in the market, the Commission is examining alternatives to market hyphenation to more accurately reflect the true level of competition among specific stations in large and complex ADI market areas.[11] Inasmuch as this proposal

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[7] Golden Orange notes that its transmitter is located at the same Sunset Ridge site as those of television stations KSCI and KZKI, both licensed to San Bernardino. It also points out that the transmission facilities of KRCA(TV), Riverside, California, proponent in MM Docket No. 93-207 to include Riverside as a designated community in the subject hyphenated market (*See* note 1, *supra*), are also located at the Sunset Ridge site. Golden Orange further states that amendment of Section 76.51 in this case will not expand KDOC-TV's market "to any significant degree *vis a vis* other market stations."

[8] Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

[9] CCC's pleading is inconsistent with the Commission's determination that, where appropriate, requests to amend Section 76.51 will be considered under an expedited rulemaking procedure without first seeking public comment on whether to issue a notice of proposed rulemaking based on the submitted petition. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2978.

[10] *See, e.g., Notice of Proposed Rulemaking* in MM Docket No. 93-290 (Newton, New Jersey and Riverhead, New York), 8 FCC Rcd 8136, n.2 (1993). Thus, while special relief petitions are the appropriate vehicle to examine specific questions of carriage with respect to individual television stations and cable systems, requests to amend Section 76.51 of the Rules, such as the instant request, are instead directed to the copyright implications of stations if carried in the ADI in which they are already entitled to mandatory carriage.

[11] *Id. See also Notice of Proposed Rulemaking* in MM Docket No. 93-291 (Lawrence, Massachusetts), 8 FCC Rcd 8171 (1993). Among the matters the Commission has sought comment on in those proceedings are possible alternative mechanisms short of market hyphenation to address the problems of individual stations operating in large markets under existing rules. In those cases where market hyphenation may not be appropriate, comment is sought on whether appropriate rule waivers or "partial

affects the nation's second largest market, interested parties, including CCC, may wish to address the issues raised in that proceeding in relation to the instant proposal.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 18, 1994,** and reply comments on or before **February 2, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

12. For additional information on this proceeding, contact Alan E. Aronowitz, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

hyphenation" of large markets might be preferable, or whether all communities to which stations are licensed may warrant inclusion in a proposed hyphenation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BankAmerica Corporation,
The Chase Manhattan Corporation,
Citicorp, and
MBNA America Bank, N.A.,
Complainants

v. File Nos. E-90-211,
E-90-212, and
E-90-213

American Telephone & Telegraph Co.,
AT&T Universal Card Services Corp.,
and Universal Bank,
Defendants

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1993; Released: December 21, 1993

By the Acting Chief, Commmon Carrier Bureau:

I. INTRODUCTION

1. On May 14, 1990, BankAmerica Corporation, The Chase Manhattan Corporation, Citicorp and MBNA America Bank, N.A. ("the Banks") filed a formal complaint pursuant to Section 208 of the Communications Act (Act), 47 U.S.C. § 208, against American Telephone and Telegraph Co. ("AT&T"), AT&T Universal Card Services Corp. ("ATT/UCS"), and Universal Bank. The complaint alleges that defendants have violated Sections 201(b), 202(a) and 203(c) of the Act, 47 U.S.C. §§ 201(b), 202(a) & 203(c), in connection with their AT&T Universal Card, a combined calling card and general purpose commercial credit card. The Banks seek a Commission Order that would enjoin certain Universal Card discounts, selective access practices and inter-affiliate support services, initiate a Commission audit, and award unspecified damages in connection with the Universal Card program. For the reasons discussed below, we deny the complaint.

II. BACKGROUND

2. AT&T introduced the Universal Card on March 26, 1990, to be available to residential AT&T customers as either a MasterCard or Visa Card under their respective affinity programs. The card enables holders to charge both AT&T regulated services and general consumer goods and services to the same account, billed on a consolidated monthly credit card statement. As a general purpose commercial credit card, the Universal Card allows revolving account financing for balances not paid within thirty days, including that portion of the bill attributable to AT&T regulated service. When introducing the Universal Card in March 1990, AT&T stated that its profit would come initially from protecting and enhancing its normal regulated calling card business and subsequently from conventional commercial card operations as well.[1] In its first year, the Universal Card gained approximately 8.5 million card holders, who thereby qualified as "charter members," and by June 1991, it became the second largest Visa/Mastercard operation in the country.[2] MCI and Sprint also have Visa or MasterCard programs, with various promotional offers of free calling and other benefits.[3]

3. The Universal Card is provided through a complex set of agreements and interrelationships among several entities, principally: AT&T, the corporate parent; AT&T Communications, Inc. (ATTC), the regulated basic service subsidiary; AT&T Universal Card Services, Inc. (ATT/UCS), a new AT&T non-regulated subsidiary established for this specific purpose; and Universal Bank, as a new non-affiliated, independent special purpose bank also established for this specific purpose.[4] As in any conventional credit card arrangement, card holder customers may purchase goods and services from participating vendors through charges on the card, and the vendors periodically sell the resulting receivables at a discount, called a "merchant fee," to the banking sponsor, Universal Bank; Universal Bank then carries the receivables until collection on a revolving account basis.

4. The Universal Card venture is unlike typical credit card arrangements in at least three material respects. First, the Universal Card is the only commercial credit card which ATTC will accept as a vendor of basic residential MTS service, and it is therefore the only way residential customers can obtain revolving account financing for ATTC basic service. Second, Universal Bank is a limited operation, having only three employees and one personal computer, and it obtains virtually all the financial resources to carry the card receivables from ATT/UCS through deposits and lines of credit. Finally, the system was designed by the AT&T parent to accord charter member card holders a 10 percent discount on all regulated ATTC long-distance service at the expense of non-regulated ATT/UCS.

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[1] *See* introductory press conference of March 26, 1990, Banks' Complaint, Appendix 1, p.20.

[2] *Wall Street Journal*, August 26, 1992, at B1.

[3] Memorandum of Universal Bank in Support of Motion to Dismiss the Complaint, June 28, 1990, Exs. 1-3.

[4] The internal corporate structure of AT&T underlying the Universal Card is central to many of the issues raised in the Banks' complaint. Where necessary, this Order will distinguish these elements using the terms "AT&T" for the corporate parent, "ATTC" for the regulated common carrier subsidiary, and "ATT/UCS" for the non-regulated card operations subsidiary. Where these distinctions are not germane, however, this Order will use the term "AT&T" for the comprehensive business entity and the joint defendants filing pleadings in this proceeding.

5. The 10 percent discount is effected through a series of coordinated transactions over each billing cycle. Shortly after the end of the billing month, ATT/UCS separately remits to Universal Bank an amount equal to an accumulated 10 percent discount on all regulated ATTC service charged to the card that month by all Universal Card charter members. Universal Bank later collects the receivables via consolidated monthly bills to the customer card holders. Universal Bank, however, reduces its billing to charter members by the amount of the 10 percent discount previously remitted by ATT/UCS to Universal Bank. Universal Bank does not need to collect this amount from the charter members to make itself whole because it has already separately received that sum from ATT/UCS. Both the full amount payable for ATTC's regulated service and the 10 percent discount may appear separately on the same billing document and represent distinct accounting transactions. Finally, ATT/UCS does not in turn recoup the 10 percent amount from any source, but rather simply absorbs the loss as a business expense, purportedly in furtherance of its non-regulated Universal Card venture.

6. In addition to the foregoing arrangements, ATTC and ATT/UCS have entered into a number of agreements in connection with the introduction and marketing of the Universal Card. ATTC has made available to ATT/UCS, for certain fees based on cost: customer lists, market research, strategic planning data, and advanced customer service technology. In turn, ATT/UCS has provided to ATTC, for certain fees based on cost: sales promotion telemarketing, direct mailing, and allocated costs of common overhead. AT&T states that all of these inter-entity transactions are being accounted for consistent with the Commission's affiliate transactions rules and other applicable rules.[5]

III. DISCRIMINATORY AND UNTARIFFED DISCOUNTS

A. Contentions

1. The Banks' Contentions

7. The Banks argue that the AT&T Universal Card is essentially a vehicle for an impermissible 10 percent discount on its basic regulated service, in violation of the prohibitions against unreasonable practices contained in Section 201(a),[6] unreasonable discrimination contained in Section 202(a),[7] and against rebates contained in Section 203(c)[8] of the Act. They claim that the discount plainly imposes on similarly situated customers different prices for identical communications services based solely on the form of payment, with no reasonable basis in underlying costs or other legitimate factors.

8. The Banks next allege that the separate corporate structure and operations of ATT/UCS and Universal Bank are in certain respects insubstantial and that AT&T has created the artificial interaffiliate arrangements to make the discount appear to come from non-regulated ATT/UCS via Universal Bank, rather than from ATTC. According to the Banks, Universal Bank is no more than a sham to enable ATTC to do indirectly what it cannot do directly.[9] In support, the Banks invoke a line of early U.S. Supreme Court cases concerning the Interstate Commerce Commission which hold that when a nominally independent, non-regulated affiliate is an essential, intertwined link in a system of otherwise regulated operations, and the non-regulated entity's participation in that system contributes to an indirect violation of the regulations, the agency may pierce the corporate veil and exercise jurisdiction over the non-regulated affiliate.[10] The Banks also cite the Commission's decision in *ITT World Communications v. TRT Communications* for the proposition that, while international record carriers could price detariffed customer premises equipment (CPE) flexibly for a variety of business purposes, this pricing may not be intended as an indirect discount on regulated service.[11]

9. The Banks further argue that the various structural or non-structural measures and safeguards established by the Commission's rules regarding CPE, enhanced services, and affiliate transactions do not allow the 10 percent discount in AT&T's Universal Card plan. In particular, they contend that the rules governing affiliate transactions, 47 C.F.R. § 32.27,[12] were intended to apply to carriers entering

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[5] AT&T's Brief, attached Affidavit of Harold J. Masters, Assistant Controller - Cost Assignment, Finance Department, AT&T.

[6] Section 201(b) provides, in part: "All charges, practices, classification, and regulations for and in connection with [interstate] communications services shall be just and reasonable."

[7] Section 202(a) provides, in part: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage...."

[8] Section 203(c) provides, in part: [N]o carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for [interstate] communication... or (2) refund or remit by any means or device any portion of the charges so specified....

[9] Banks' Main Brief at 19-29.

[10] *Id.* at 23-25, *citing Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498 (1911) (*Southern Pacific*); *United States v. Union Stock Yards & Transit Co.*, 226 U.S. 286 (1912); *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U.S. 316, 323 (1913). In *Southern Pacific*, the leading case, a holding company owned the sole sources of railway, wharfage, and steamship service in the port of Galveston, Texas, and the regulated railway provider was held responsible for discrimination practiced by the non-regulated wharfage provider.

[11] *ITT World Communications, Inc. v. TRT Telecommunications Corp.* 51 R.R.2d 1386 (Com. Car. Bur. 1982) (*ITT World Com*). In particular, the Commission stated, with quotation from a previous decision, that a rebate on regulated services is no less unlawful because it is provided by a non-regulated affiliate, and that "'[we] will not hesitate to pierce the corporate veil...' in situations of this kind." *Id.* at 1391.

[12] Section 32.27(c) provides, in pertinent part, that when an asset is transferred from a regulated affiliate to a non-regulated one and there is no tariffed or prevailing price, the transaction should be recorded at the higher of depreciated cost or estimated fair market value. Section 32.27 also provides that when a carrier supplies substantially all of a service to, or receives substantially all of a service from, an affiliate, which service is not also provided to unaffiliated persons or entities, the associated revenue and expense shall be recorded at cost in accordance with the joint and common cost rules (47 C.F.R. §§

businesses other than basic telecommunications service.[13] In this connection, they refer to AT&T's statement when introducing the Universal Card that the first profits it would seek were on the regulated calling card telephone business.[14]

2. AT&T's Contentions

10. AT&T concedes, in effect, that the discount at issue is available only to those ATTC customers who are charter members of the Universal Card. It maintains, however, that the discount is a legitimate business expense incurred by its non-regulated affiliate ATT/UCS for the express purpose of promoting ATT/UCS's credit card venture. AT&T claims that the Banks' allegations of unlawful discrimination overlook the critical distinction between the regulated operations of ATTC and the non-regulated enterprise of ATT/UCS.[15] According to AT&T, ATT/UCS pursues a line of business distinct from ATTC's regulated services and its relationship with ATTC and AT&T as the corporate parent is immaterial to deciding whether a Communications Act violation has been committed.[16]

11. AT&T claims that the Commission has previously recognized the propriety of such discounts. For example, AT&T notes that *ITT World Com, supra*, allows sellers of non-regulated terminal equipment to price in any way they choose so long as the purpose is to foster the non-regulated business.[17] AT&T relies primarily, however, on a favorable advisory opinion of the Bureau in a context very similar to the instant proceeding.[18] In 1980, American Express petitioned the Bureau for an advisory ruling on its plan to offer marketing, billing and other functions in connection with MCI's residential Execunet service. The plan included a "unilateral decision" by American Express to offer its card holders a discount on MCI's flat monthly rates which would not affect the revenue which MCI received for the service. The Bureau ruled that the proposal did not constitute unreasonable discrimination under Section 202(a) or prohibited rebates under Section 203(c) because MCI would receive its full tariffed rates for the service to MCI patrons, and American Express's independent business decision to contribute to its card holders' MCI bills did not alter this fact.[19] Applying this principle to the instant case, AT&T argues that the only difference between the American Express/MCI plan and the Universal Card is that the latter involves affiliate transactions. But this is immaterial, AT&T concludes, because its plan is in compliance with the Commission's affiliate transactions rules.[20]

12. Finally, AT&T argues that piercing the corporate veil under the authorities cited by the complainant Banks is inappropriate because the non-regulated affiliate is not essential to, or inseparably intertwined with, ATTC's regulated operations. On the contrary, AT&T claims, ATTC's regulated service and ATT/UCS's credit card offering are entirely separate businesses. AT&T asserts that ATTC customers have a wide range of alternative forms of payment, including AT&T calling cards, local exchange carrier (LEC) joint use cards, other commercial credit cards in certain specially equipped phones in airports and similar locations, collect calls, and third party calls.[21]

B. Discussion

1. Discrimination

13. At the outset, we note that the record establishes that a class of ATTC's customers, the Universal Card charter members, receive a discount on ATTC's regulated services that is not available to non-charter members and other users of AT&T's services. The main question before us is whether the discounted rates afforded to the charter members constitute a form of unlawful discrimination within the meaning of Section 202(a) of the Act.[22]

14. We have reviewed the evidence and arguments presented by the parties and find no persuasive support for the Banks' contention that AT&T has engaged in unlawful discrimination within the meaning of Section 202(a). The Banks proffer no basis upon which we can conclude that the corporate and accounting arrangements which separate ATTC's common carrier operations from ATT/UCS's commercial credit card business are in any way unreasonable or otherwise deceptive. To the contrary, the record indicates that AT&T has fully observed the Commission's affiliate transaction rules requiring stringent structural separation.[23]

64.901-02). *See also:* Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and their Non-regulated Affiliates, CC Docket No. 93-251, Notice of Proposed Rulemaking, FCC 93-453 (released October 20, 1993).

[13] Banks' Reply Brief at 8, *citing Separation of Costs of Regulated Telephone Service from Cost of Nonregulated Activities*, 2 FCC Rcd 1298 (1987), *recon.* 2 FCC Rcd 6283 (1987), *further recon.* 3 FCC Rcd 6701 (1988), *aff'd sub nom. Southwestern Bell v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). *See also* Sections 64.901 & 64.902 of the Commission's Rules, 47 C.F.R. §§ 64.901-02.

[14] Banks' Main Brief at 28-29.

[15] AT&T's Brief at 7-8.

[16] *Id.* at 7-9.

[17] *Id.* at 9-10.

[18] *Id.* at 10-12, *citing* Letter dated December 29, 1980, from Phillip L. Verveer, Chief Common Carrier Bureau, to Laurance W. Secrest, III, Kirkland & Ellis.

[19] AT&T also cites *AT&T Opportunity Calling* and *Lexicom, Inc. v. AT&T Communications, Inc.*, File Nos. ENF-84-36, E-84-28, Order, Mimeo No. 3628, released Apr. 4, 1985, in which the Bureau reached a similar conclusion concerning AT&T's offer of "dollar credits" for various manufactured products based on usage of regulated service.

[20] AT&T's Brief at 11-12.

[21] *Id.* at 12-14.

[22] To establish a claim that a carrier has engaged in unjust and unreasonable discrimination within the meaning of Section 202(a), a complainant must plead facts showing that the services at issue are like and that there is a difference in the carrier's provision or pricing of the services. Once like services and disparate treatment are shown, the burden shifts to the carrier to show that the discrimination is not unjust and unreasonable. *See* MCI Telecommunication Corp. v. FCC, 817 F.2d 30, 39 (D.C. Cir. 1990).

[23] Attached to AT&T's Brief is an affidavit, dated September 19, 1991, by Harold J. Masters, Assistant Controller-Cost Assignment in AT&T's Finance Department, which is the entity responsible for compliance with the Commission's affiliate transactions rules. The affidavit describes various procedures that AT&T adopted to comply with the rules, including the adjustment regarding operator services discussed in paragraph 23, *infra*. We find that the Banks have offered nothing to refute AT&T's claim of compliance in this respect.

15. Nor do we believe that ATT/UCS is an essential, intertwined link in ATTC's provision or billing of regulated services in the way contemplated by the early cases on which the Banks rely. The leading case cited by the Banks, *Southern Pacific*, concerned customers of a regulated railroad who had no choice but to use the non-regulated facilities of the commonly owned wharfage company which practiced the discrimination. Here, however, there are numerous other options for billing residential interexchange service, including AT&T and other interexchange carrier calling cards, LEC joint use cards, and commercial credit cards for the service of other interexchange carriers. Moreover, there are many avenues open to consumers seeking discounts on carrier services, including service from resellers, use of other commercial credit cards, and use of promotional discounts offered by other businesses.

16. Finally, we reject the Banks' contention that the corporate boundaries should be disregarded because the discount is primarily intended as an indirect stimulus to the demand for regulated service and calling card operations. The record does not support the Banks' claim that this was the major purpose of the discount or its major effect.[24] Moreover, as the *American Express* advisory indicates, our main concern from the standpoint of ATTC is that it receive its full tariffed rates for its regulated services. The record shows that ATTC receives its full tariffed rate, and the Banks have not presented evidence to show any discernable effect of the discount on ATTC's regulated operations or that the discount is otherwise improper. In the absence of persuasive evidence to support the Banks' claims of non-arms length transactions between ATTC and its non-regulated affiliate or violations of the Commission's affiliate transactions rules, there is insufficient reason for us to attribute to ATTC the actions of ATT/UCS or Universal Bank. Therefore, we find that the Banks have failed to establish a claim of unreasonable discrimination within the meaning of Section 202(a) of the Act or of unreasonable practices under Section 201(b) of the Act.

2. Unlawful Rebate

17. We turn now to the Banks' claim of unlawful rebates under Section 203(c) of the Act. Our analysis of the rebate issue is similar to our analysis of the Banks' discrimination claims insofar as the Banks rely primarily on alleged shortcomings in the corporate and contractual underpinnings of the Universal Card discount. First, the record persuades us that there is valid structural separation in compliance with the affiliate transactions rules and in comparison with the requirements of other analogous rules.[25] Second, the Universal Card activities of ATT/UCS and Universal Bank are not inseparably linked with billing for interexchange service because there are many alternatives available and charter membership itself was reasonably available. Moreover, the record does not support the Banks' contention that the primary effect and intent of the discount was to benefit ATTC's regulated services.

18. The substance of a Section 203(c) violation is that the regulated entity charged a rate less than its tariffed rate. Since we have already determined that the actions of ATT/UCS and Universal Bank should not be ascribed to ATTC in this context, there is no discount granted by the regulated entity. Moreover, the principle relied on in the *American Express* advisory, that the regulated entity receives its full tariffed rate, is equivalent to stating that it charged this rate. We find no precedent or policy consideration to further require that all customers must also pay that full rate when the mechanism by which the discount is effected is completely beyond the regulatory sphere and the customers not receiving the discount are made no worse off.

IV. UNREASONABLE CARD HONORING AND OPERATOR ASSISTANCE

A. Contentions

1. Banks' Contentions

19. The Banks charge that AT&T has violated the prohibition against unreasonable preference in Section 202(a) of the Act and the just and reasonable requirement in Section 201(b) of the Act by refusing to honor any general purpose credit card other than its own Universal Card for regulated ATTC service. They note that AT&T emphasized this exclusive dealing in its massive advertising campaign for the Universal Card. The Banks state, for example, that AT&T's marketing approach stressed that the Universal Card is "accepted everywhere a [bank-sponsored VISA/MasterCard] is, plus 200 million other places -- telephones." The Banks also claim that many public phones with card swipe capabilities installed by AT&T are designed or programmed to accept only the Universal Card.[26]

20. The Banks also argue that ATTC is favoring its non-regulated credit card affiliate in a discriminatory manner by giving free operator services to existing or potential customers of ATT/UCS that it will not give to such customers of any other commercial credit card provider. The Banks cite a survey they commissioned which generally showed that, in response to requests for information about new Universal Cards or account information on existing ones, the regulated ATTC operators generally either connected customers directly to ATT/UCS or provided them with its 800 number.[27]

2. AT&T's Contentions

21. AT&T maintains that Universal Cards represent only a small fraction of all calling cards that AT&T has issued, that these other conventional AT&T calling cards are freely available to any customer, and that many other calling cards, such as LEC joint use cards, are also usable for ATTC service.[28] Concerning the alleged preferential treatment by ATTC operators, AT&T concedes that its operators help callers reach sources of information about Universal

[24] The only direct evidence cited by the Banks is the excerpt from AT&T's introductory press conference for the Universal Card referenced in note 1, *supra*, and this merely indicates that some of AT&T's anticipated profit will come from the protection and enhancement of its regulated calling card business. Banks' Complaint, Appendix 1, p. 20. Moreover, if AT&T had wanted to do only this, it could have simply offered attractive discounts available only with its own regular proprietary calling card; in fact it did do just this in its CIID card volume discount filing. *See* AT&T Communications, 7 FCC Rcd 7730 (1992).

[25] *See* n.23, *supra*.

[26] Banks' Main Brief at 30-33.

[27] *Id.* at 33-35 & Appendix A.

[28] AT&T's Brief at 15-16.

Cards, but states that this activity constitutes a *de minimis* portion of ongoing operator activity.[29] AT&T also concedes that some of the costs of its card-related activities were not initially allocated pursuant to the affiliate transactions rules. According to AT&T, it had originally expected that, after the initial card introduction period, card-related operator inquiries would be so limited that the transaction cost of inter-affiliate billing to ATT/UCS for the service would exceed the cost of the service itself, and that it therefore did not establish a routine billing mechanism for these periods. AT&T further states that, regardless of the amount involved, a billing mechanism for all Universal Card-related operator inquiries has now been established.[30]

B. Discussion

22. We again conclude that the Banks have failed to establish a claim of unreasonable discrimination under Section 202(a) or that AT&T has engaged in unjust and unreasonable practices under Section 201(b). We can find no evidence in the record to support the Banks' proposition that AT&T is required to honor other credit cards. A dominant carrier's obligation under the Act to hold itself out without discrimination does not extend to non-common carrier activities. The Banks have cited no basis in the Act, the Commission's Rules or the Commission's prior decisions for requiring AT&T to honor a competing non-carrier's card on its own proprietary network and validation database.

23. With regard to the Banks' claim that ATTC operators gratuitously extend undue preference to customer inquiries about the Universal Card within the meaning of Section 202(a), AT&T admits, in effect, that during certain periods after the introductory phase of the Universal Card, it failed to bill ATT/UCS for Universal Card-related operator inquiries and that this action may have been inconsistent with the Commission's affiliate transaction rules. AT&T states that it now has a billing mechanism in place to collect and allocate all of these costs properly under the affiliate transactions rules, notwithstanding what it characterizes as the *de minimis* dollar amounts involved. In light of AT&T's representations regarding this matter, we do not believe that further action is warranted at this time. We do, however, strongly admonish AT&T to comply with the affiliate transactions rules more carefully in the future. Should future violations by AT&T come to our attention, we will take appropriate enforcement action.

V. CUSTOMER PROPRIETARY NETWORK INFORMATION

A. Contentions

1. Banks' Contentions

24. The Banks claim that AT&T has attempted to promote its Universal Card venture through improper use of customer proprietary network information (CPNI), contrary to 47 C.F.R. § 64.702.[31] They argue that ATTC has made available to ATT/UCS information concerning market research, planning and regulated customer characteristics.[32] They observe that AT&T refuses to give such information to other general purpose credit card users, issuers, or sponsors under any conditions on the grounds that it is proprietary to AT&T.[33] The Banks argue that this information is CPNI and that ATTC is using its position as a regulated carrier in possession of such information to favor its non-regulated venture. The Banks further contend that, even though the CPNI rules are written in terms of a carrier's use of CPNI to market non-regulated CPE or enhanced services, the rules and other non-structural safeguards "obviously are intended to apply to other lines of business which AT&T may enter," such as the general credit card industry.[34] Finally, the Banks argue that Universal Card operations do in fact constitute enhanced services as defined in Section 64.702(a) because validation for consumer credit purchases and automated teller machine (ATM) transactions involves "subscriber interaction with stored information."[35]

2. AT&T's Contentions

25. AT&T replies that it has not violated the Commission's CPNI rules because they apply only to regulated common carriers or their affiliates who provide CPE or enhanced services. AT&T argues that the CPNI rules, and the non-structural safeguards of which they are a part, were carefully limited to carriers' provision of CPE and enhanced service because those latter activities were seen as potentially dependent on a carrier's regulated services, and thus susceptible to anticompetitive discrimination or leveraging. AT&T argues that the credit card business, by contrast, is totally distinct and independent from the telecommunications common carriage business and the danger of impinging unfairly on a competitor's position is less marked.[36]

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[29] AT&T estimates that a few hundredths of one percent of operators' time is spent on Universal Card matters. *Id.* at 20, n. *.

[30] *Id.* at 19-20 & Attached Affidavit of H. Masters at 2-3.

[31] In our first major Order reviewing the BOCs' open network architecture plans, we stated:

> Our CPNI rules apply, with minor exceptions, to all information about customers' network services and customers' use of those services that a BOC [Bell Operating Company] possesses by virtue of its provision of network services. ...[This includes] billing information... usage data and calling patterns... This is precisely the kind of customer information to which the CPNI rules apply, since it is information that can invoke proprietary and competitive considerations and that customers might thus want to restrict. ... We also clarify that we do not consider credit information to be CPNI.

Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 at 215-16 (paras. 411-12). Although this passage is specifically applicable to the BOCs, similar considerations apply to AT&T as well.

[32] Banks' Main Brief at 35-36.

[33] *Id.* at 36, *citing* AT&T's Supplemental Response to Complainants' Interrogatory No. 10.

[34] *Id.* at 38.

[35] Bank's Reply Brief at 17-21.

[36] AT&T's Brief at 17-18.

B. Discussion

26. AT&T is clearly correct that, by their terms, our CPNI rules and other non-structural safeguards developed pursuant to the *Third Computer Inquiry* and other proceedings are, for AT&T as well as the BOCs, exclusively applicable to the sale and provision of CPE and enhanced services. We need not resolve, however, whether those rules apply to the information ATTC provided to ATT/UCS, for even if they do, AT&T is not required to provide that same information to the Banks on the latter's demand. The applicable CPNI rule requires disclosure of such customer information only if the customer in question affirmatively authorizes its release.[37] There is no indication in the record that any of the ATTC residential customers here did so authorize, nor is it likely that they would want such material routinely forwarded to otherwise unrelated banks for marketing purposes.

27. As long as this and other applicable rules are observed, ATTC may share this material with a non-regulated affiliate entity, whether structurally or non-structurally separate. This is closely analogous to joint marketing under certain safeguards, which necessarily involves sharing of some customer network information with a non-regulated affiliate to promote goods and services which involve both regulated and non-regulated functions.[38] Accordingly, we reject the argument that AT&T violated the CPNI rules by not providing this information to the Banks at the latters' request, and we find no evidence of any other apparent violation of the CPNI requirements.

VI. CROSS-SUBSIDIES AMONG AFFILIATES

A. Contentions

1. Banks' Contentions

28. The Banks allege that AT&T is improperly cross-subsidizing its non-regulated credit card venture at the expense of its regulated affiliate. They argue that the underlying Universal Card contractual agreements themselves and other information obtained through discovery show that assets and services are indeed flowing between ATTC and ATT/UCS at noncompensatory prices or even for free. They note the operator services discussed in Section IV, *supra*, customer lists, usage information, and merchant fees. Further, the Banks maintain that, since ATTC and ATT/UCS generally do not offer most of these services or products to any other buyers, there is no "external market test" to establish the value of items such as customer lists and usage information.[39]

2. AT&T's Contentions

29. AT&T denies that there are improper subsidies flowing between ATTC and ATT/UCS. First, AT&T contends that the cross-subsidy claim is completely foreclosed by AT&T's compliance with the affiliate transactions rules and that ATTC residential customers are protected from discriminatory cross-subsidy by the Commission's price cap rules.[40] Moreover, AT&T charges that, after extensive discovery on the matter, the Banks have been unable to articulate a single definitive cross-subsidy claim; rather, they have merely asserted that the record "suggests" cross-subsidies which are difficult to trace, and that the Commission should therefore conduct a "close audit."[41] AT&T emphasizes that its operators, data bases, and marketing information in fact can be lawfully shared on a structurally unseparated basis as long as ATT/UCS assumes responsibility for its proper share of the costs under the applicable regulations. AT&T adds that, although the Banks might prefer that ATT/UCS be charged for the commercial (*i.e.* market) value of the information subject to "market discipline" rather than cost, the Commission's rules do not so require.[42] AT&T also refutes specific instances cited by the Banks.[43]

B. Discussion

30. After considerable discovery, the Banks have failed to make a persuasive showing of continuing unlawful cross-subsidies between the AT&T affiliates involved in the Universal Card venture. The few specifics cited by the Banks are either insubstantial or reflect a misunderstanding of the applicable rules. As one example, the Banks cite ATT/UCS's failure to pay ATTC for the operator services discussed in Section IV *supra*.[44] As we note in that section, however, AT&T has represented that it has established the appropriate mechanism to duly apportion these arguably *de minimis* costs in accordance with the affiliate transactions rules.[45]

31. The Banks' other examples concern alleged interaffiliate cross-subsidies, involving customer lists, usage information, and sales promotion activities. The Banks have complained that there is no "external market test" to determine the "commercial value" of these goods and services and that such value would obviously be greater than the "costs" which ATTC and ATT/UCS have actually charged one another.

32. The Banks' arguments are not persuasive. The pertinent regulations, Section 32.27(c) of the Commission's Rules, provide that when an asset is transferred from a regulated affiliate to a non-regulated one and there is no tariffed or prevailing price, the transaction should be recorded at the higher of depreciated cost or estimated fair market value. Section 37.27(d) further provides that when a carrier supplies substantially all of a service to, or receives substantially all of a service from, an affiliate, which service is not also provided to unaffiliated persons or entities, the associated revenue and expense shall be recorded at cost in accordance with the joint and common cost rules.[46] The Banks' reference to the absence of an "external market test" to establish the value of the assets and services

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[37] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), 2 FCC Rcd 3035, 3093-98 (1987); 3 FCC Rcd 1135, 1161-64 (1988).

[38] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7609-14 (1991).

[39] Banks' Main Brief at 39-40.

[40] AT&T's Brief at 18.

[41] *Id.* at 18-19.

[42] *Id.* at 19-21.

[43] *Id.* at 19-22.

[44] Banks' Main Brief at 33-35.

[45] *Id.* at 16, *citing* Master's Affidavit at para. 5.

[46] *See* 47 C.F.R. §§ 64.901-02.

flowing between ATTC and ATT/UCS appears to rest on an assumption that the supply relationships in question are exclusive, two-party affairs. Although we agree that the transactions appear to be exclusive in this sense, the clear consequence of this fact under Section 32.27(d) is that cost is the requisite valuation basis, not prevailing price or some "external market" price to which the Banks allude. Accordingly, we find that the Banks have failed to demonstrate unlawful affiliate cross-subsidies.

VIII. CONCLUSION AND ORDERING PARAGRAPH

33. For the reasons discussed above, we conclude that the arguments of the Banks that the AT&T Universal Card venture is unlawful under the Communications Act or the Commission's Rules and relevant decisions are without merit and that the complaint should be denied.[47]

34. Accordingly, IT IS ORDERED pursuant to Section 4(i), 4(j), 202 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 202(a) and 208, that the formal complaint filed on May 14, 1990, by BankAmerica Corporation, The Chase Manhattan Corporation, Citicorp and MBNA America Bank against American Telephone and Telegraph Company, AT&T Universal Card Services Corporation, and Universal Bank IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen Levitz
Acting Chief
Common Carrier Bureau

[47] In a preliminary motion and its brief, Universal Bank challenges the Commission's Title II authority over it under Sections 153(h) and 411(a) of the Act, 47 U.S.C. §§ 153(h), 411(a). The Banks reply that the Commission does have such authority because AT&T essentially controls Universal Bank. Since we are denying the Bank's complaint, the matter is moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BEEPERS +, d/b/a Paging Services,
Complainant,

v. File No. E-90-391
File No. E-90-392

MOBILECOMM OF MEMPHIS, INC.,
SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Defendants.

ORDER

Adopted: December 13, 1993; Released: December 21, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On June 25, 1990, Beepers +, also d/b/a Paging Services, (Beepers) filed the above-captioned Complaint against MobileComm of Memphis, Inc., (MobileComm) and South Central Bell Telephone Company (SCBT) alleging violations of Sections 201(b) and 202(n) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a). MobileComm and SCBT subsequently filed an Answer and Motion to Dismiss and the Complainant and Defendants engaged in discovery and filed assorted responsive pleadings.

2. On November 12, 1993, MobileComm of Tennessee, Inc., successor in interest to MobileComm, BellSouth Telecommunications, Inc., the successor in interest to SCBT, and Beepers Plus, Inc., the successor in interest to Beepers, notified the Commission that the parties had reached a comprehensive settlement of the issues raised in the above-captioned formal complaints and requested that the Commission dismiss the referenced formal complaints with prejudice.

3. We are satisfied that dismissal of the Complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 208, and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the joint withdrawal request filed by MobileComm of Tennessee, Inc., BellSouth Telecommunications, Inc. and Beepers Plus, Inc. IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
and Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BEST PAYPHONES, INC.
Complainant,

v. File No. E-92-01

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: December 13, 1993; Released: December 21, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On October 9, 1991, Best Payphones, Inc. (Best) filed the above-captioned Complaint against American Telephone and Telegraph Company (AT&T) alleging that AT&T acted unlawfully in attempting to collect charges for unauthorized interstate and international calls that were either originated or accepted at one of its payphone locations. AT&T filed an Answer denying the allegations.

2. On November 4, 1993, Best notified the Commission that the parties had voluntarily settled all matters at issue in the complaint and requested permission to withdraw its complaint with prejudice.

3. We are satisfied that withdrawal of the Complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 208, and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the withdrawal request filed by Best Payphones, Inc. IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Renewal Application

of New York MDS, Inc. File No. 57910-CM-R-91

For Authority to Operate
a Multipoint Distribution
Service Station WLK227 on Channel 2
at New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1993; Released: December 21, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced renewal application of New York MDS, Inc. (Applicant) to operate a Multipoint Distribution Service (MDS) station on Channel 2 at New York, New York was filed on April 1, 1991, thirty days prior to the expiration of its license term, May 1, 1991, as required by 47 C.F.R. Sec. 21.11(c). Danjon, Inc. filed a Petition to Dismiss Application on July 17, 1991, arguing that the renewal application of New York MDS was cut-off pursuant to 47 C.F.R. Sec. 21.914 by the filing of Danjon's initial application for a new station for Channel 2 at New York, New York on March 4, 1991 (File No. 58327-CM-P-91). Applicant filed an opposition. Danjon filed a reply.

2. *Petition*. Danjon argues that 47 C.F.R. Sec. 21.914 requires that this renewal application must be returned as unacceptable for filing and dismissed as cut-off because it was not filed on the same calendar day as Danjon's initial application. "It should also be noted that the language of Section 21.914 ... does not contain any exception for license renewal applications, nor does the Commission's [rulemaking order], which adopted Section 21.914, evidence any intent by the Commission to make the rule inapplicable to any MDS renewal applications." Danjon's Petition at 4. It is further argued that the filing of the renewal application on the 60th day prior to the May 1, 1991 expiration date of the license would have avoided the risk of being cut-off, pursuant to Sections 21.11(c) and 21.914, by the filing of Danjon's application. Danjon also requests that the Commission reverse the public notice statement that Danjon's initial application for a new station appears to be mutually-exclusive with this renewal application.

3. *Opposition*. New York MDS argues in its opposition that Danjon's petition was untimely filed because it was filed on July 12, 1991, missing the thirty-day deadline for filing a petition to deny prescribed at 47 C.F.R. Sec. 21.30(a).[1] The renewal applicant also argues that Section 21.914 does not apply to renewal applications. "There was no discussion or inference that the rule was intended to apply to renewal applications" in the *Wireless Cable Report and Order*, 5 FCC Rcd 6410, 6424 (1990), and "the Commission justified it solely as a solution to the flood of 'copy cat' applications which were commonly being filed within the 60 day filing window established by Section 21.31(b)(2). "[I]f the Commission were to adopt or interpret a rule which has the effect of denying a right to consideration of a renewal application which is timely filed according to another rule, it would be obliged to give fair notice in [Section 21.11(c)] of the circumstances under which such an application may nonetheless be cut-off." In addition, the applicant states that "[e]ven more elemental is the right implicit in Section 307 of the Communications Act of 1934 of a licensee to seek a timely renewal of a license and the obligation of the Commission to fairly consider that application. The applicant cites *Chronicle Broadcasting Co.*, 29 Rad. Reg. 2d 336, 340 (1974) for the proposition that the Communications Act's Section 307 and the Administrative Procedure Act's Section 9(b) prevent the Commission from dismissing a timely filed and sufficient renewal application without considering grant or denial of the application on its merits.

4. *Reply*. Partially based upon the "plain meaning rule," Danjon argues in its reply that:

> rather than concluding from the [language of the rulemaking order] and from the plain language of Section 21.914 that the Commission intended no exceptions to the reach of Section 21.914, Applicant[...] essentially argue[s] that there is no evidence to suggest that the Commission intended the one-day filing window of Section 21.914 to apply in the context of MDS license renewal applications.

Danjon's Reply at 5 and 9-10. According to Danjon, the Commission's adoption of Section 21.914 was fair because the rule change was "well known to the industry" and "all existing MDS licensees are presumed to be familiar with the Commission's Rules, including Section 21.914 and Section 21.11(c)." Danjon's Reply at 10.

> Thus, all MDS licensees have been on notice since the adoption of Section 21.914 ..., that, although it was possible to file an MDS license renewal application between March 4, 1991 and April 1, 1991, nonetheless, if another competing application were filed prior to the filing of the renewal application, that first-filed application would establish the one-day filing period for the frequency in question.

Danjon's Reply at 10. Danjon cites a number of cases from the Court of Appeals for the D.C. Circuit and the U.S. Supreme Court to support its assertion that "the Commission is obligated to accept applications, such as those of Danjon, seeking authorization for a new MDS station which are, or which may become, mutually exclusive with any application for renewal of license of an incumbent MDS licensee" because the renewal licensee has no property right in the frequency. Danjon's Reply at 7-8. "Finally,

[1] The renewal application was filed on April 1, 1991, and appeared on public notice as accepted for filing on April 24, 1991. According to the applicant, therefore, a petition to deny was required to be filed on or before May 24, 1991. Danjon submitted its pleading on July 12, 1991, 49 days after May 24, 1991.

it must be borne in mind that Danjon was the first-filed applicant in [this case]; hence, Danjon cannot be properly viewed as an 'overfiler'." Danjon's Reply at 12. Danjon further asserts that its petition to dismiss was filed in a timely manner and the deadline for filing a petition to deny contained in Section 21.30 is inapplicable to Danjon's pleading because it was not intended to serve as a petition to deny. Danjon's Reply at 6.

5. *Discussion.* We agree with Danjon that the significant issue here is the filing of an MDS application after the relevant cut-off date.[2] Unfortunately, Danjon focuses on the wrong cut-off date. Pursuant to both Sections 21.31 and 21.914, the first application to be filed for a channel group in a given geographic area triggers consideration of the cut-off rule, whether the same calendar day period of Section 21.914[3] or the 30 to 60 day period of Section 21.31(b)(2).[4] Contrary to Danjon's assertion, its application was not the first application to be filed for a Channel 2 MDS station at New York City. The first application to be filed for Channel 2 at New York City was filed by Digital Paging Systems, Inc. (Digital) on March 29, 1974 (File No. 50051-CM-P-74). This application appeared on public notice on April 15, 1974, thereby triggering the 30 to 60 day cut-off period of Section 21.31(b)(2). In 1991, it was too late for Danjon's application to be comparatively considered with five (5) MDS applications filed in 1974 for Channel 2 at New York City.[5] Further, an authorized station is not stripped of its cut-off protection, pursuant to Section 21.31, by the grant of its application. The cut-off protection continues as long as the station is authorized. The Common Carrier Bureau previously addressed this issue with regard to an MDS Channel 2 application at Albany, New York, finding that the application for a new station was cut-off in relationship to any licensed station.

> The periods for filing competing applications for the frequencies assigned to each of the licensed ... facilities had long since passed when [the applicant] tendered his amendment. Because [the applicant] had met none of the filing deadlines, his application, vis-a-vis all of the [licensed] facilities, was not acceptable for filing....

Ernest Enax, Jr. and George W. Bott, 5 FCC Rcd 5835, 5836 (Comm. Car. Bur. 1990). Danjon's assertion that the filing of its initial application for a new station triggers the cut-off rule is incorrect. By proposing the same set of coordinates for its proposed MDS station as was authorized for MDS station WLK227, Danjon filed a new station application which is mutually-exclusive with an authorized station due to the potential for harmful electrical interference to station WLK227, pursuant to Section 21.31(a). *See e.g., Microband Corp. of America*, 41 FCC 2d 184, 186 (1973) ("[I]t appears that [Rust Craft's] application would be mutually exclusive with Microband's application because of electrical interference. Accordingly, Rust Craft's ... application [is] returned as unacceptable for filing for failure to file within the time prescribed by the cut-off rule."). Therefore, Danjon filed its application *after* the cut-off date for licensed station WLK227. Consequently, Danjon's application is cut-off from comparative consideration with licensed MDS station WLK227.

6. With regard to Danjon's request that we reverse the public notice announcement of mutual exclusivity, upon further review, we determine that the referenced Danjon application is mutually exclusive with station WLK227, because there would be harmful electrical interference be-

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[2] We disagree with Danjon's claim that because it labeled its pleading as a petition to dismiss, instead of a petition to deny, Section 21.30 is inapplicable and there was no deadline for filing its pleading in opposition to the referenced renewal application. Section 21.30 is titled "Opposition to applications." The rule section clearly states that petitions to deny and "petitions for other forms of relief" must comply with its provisions. Admittedly, the Danjon pleading was not filed within the thirty day period stipulated by Section 21.30. Therefore, Danjon filed its opposition to the renewal application late. Thus, pursuant to Section 21.31(b), Danjon's pleading will be classified as an informal objection, and need not be discussed in this decision, pursuant to Section 21.30(c), to the extent that it opposes the renewal application and seeks dismissal and return of the renewal application. However, Danjon's pleading was filed within 30 days of the release of the public notice announcement that the Danjon application and the renewal application appear to be mutually exclusive. Therefore, with regard to the request in Danjon's pleading that the public notice announcement be reversed, this request will be considered a petition for reconsideration of that announcement of mutual exclusivity.

[3] Section 21.914 provides, *inter alia:*

> Notwithstanding the provisions of Sec. 21.31(b)(2)(i) and (ii) of this part, to be entitled to ... comparative consideration with one or more conflicting applications, an application for frequencies at 2150-2162 MHz ... must be received in a condition acceptable for filing on the same calendar day as the first of the conflicting applications is received by the Commission in a condition acceptable for filing.

[4] Section 21.31(b) provides, *inter alia:*

> An application will be entitled to ... comparative consideration (with one or more conflicting applications only if: (1) The application is mutually exclusive with the other application; and The application is received by the Commission in a condition acceptable for filing by whichever "cut-off" date is earlier:
>
> (i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing; or
>
> (ii) One (1) business day preceding the day on which the Commission takes final action on the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of its public notice).

[5] The hearing designation order, adopted June 6, 1985 (Mimeo No. 5094) in CC Docket No. 85-194, stated that four MDS applications were mutually exclusive with the Digital application: Private Networks, Inc. (File No. 50154-CM-P-74), M.C.C.A. Service Corporation (File No. 50190-CM-P-74), Multipoint Information Systems, Inc. (File No. 50192-CM-P-74), and Chicago Communications Service, Inc. (File No. 50197-CM-P-74). By Memorandum Opinion and Order, FCC 85M-5024, released December 27, 1985, the settlement agreement of the five mutually exclusive applicants was approved, the Digital application was amended to reflect the joint venture of the five applicants, the name of the applicant was changed from Digital to New York MDS, Inc., four applications were dismissed, and the Digital application remained pending, as amended. The application of New York MDS, Inc. was granted by Memorandum Opinion and Order, FCC 86M-1083, Mimeo No. 3247, released March 27, 1986.

tween the two stations if Danjon's application was granted. However, Danjon's application is not entitled to comparative consideration with the referenced renewal application, because Danjon's application was filed after the relevant cut-off date. Pursuant to the terms of Section 21.914, Danjon's application cannot trigger the cut-off period because it was unacceptable for filing. Thus, the above-referenced renewal application of New York MDS, Inc. was not cut-off.

7. *Conclusion and Ordering Clause.* The dispositive facts in this proceeding are undisputed. We find Danjon's evidence insufficient to establish that the above-referenced renewal application was cut-off and must be dismissed.[6] Having carefully considered all the pleadings and the evidence submitted, we find that the allegations raised by Danjon, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by Danjon, Inc. IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4, 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[6] *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1536, 1573 (D.C. Cir. 1988)(hereinafter cited as *Astroline); Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988)(hereinafter cited as *Beaumont); Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394, 397 (D.C. Cir. 1985); *see also, Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE PEOPLE'S NETWORK
INCORPORATED,
Complainant,

v. File No. E-92-99

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

PROTECTIVE ORDER

Adopted: December 13, 1993; Released: December 22, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. *Non-disclosure of Stamped Confidential Documents.* Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this order, no stamped confidential document may be disclosed to any person.

A "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER IN COMPLAINT No. E-92-99, before the Federal Communications Commission" to signify that it contains information believed to be subject to protection under the Commission's rules. For purposes of this order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

2. *Permissible Disclosure.* Notwithstanding paragraph 1, stamped confidential documents may be disclosed to counsel for the parties in this action, including in-house counsel for American Telephone and Telegraph Company ("AT&T") who are actively engaged in the conduct of this litigation; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in the litigation; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to Commission officials involved in this litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Commission.[1] Subject to the provisions of subparagraph (c) below, such documents may also be disclosed:

(a) to any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper; and

(b) in the event the Commission orders that depositions may be taken, to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify to outside consultants or experts retained for the purpose of assisting counsel in the litigation; to employees of parties involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions; provided, however, that in all such cases the individual to whom disclosure is to be made has signed a form containing: (1) a recital that the signatory has read and understands this order; and (2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents is prohibited.

(c) Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to who the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten-day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Commission has denied such motion.

3. *Declassification.* A party (or aggrieved entity permitted by the Commission to intervene for such purpose) may apply to the Commission for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of

[1] Disclosure may not be made to counsel involved in any related litigation between the parties pending before the Commission or in courts, except upon specific Commission approval.

confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

4. *Confidential Information in Depositions.* In the event the Commission orders that depositions may be taken in this proceeding:

(a) A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 2(c) above are complied with. Deponents shall not retain or copy portions of the transcripts of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 2(b) above. A deponent who is not a party or a representative of a party shall be furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within fifteen (15) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential-subject to protection pursuant to Commission Order." Until expiration of the 15-day period, the entire deposition will be treated as subject to protection against disclosure under this order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

5. *Confidential Information Filed in the Record.* Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in evidence at any Commission hearing, or in the record made by the parties and submitted to the Commission in this proceeding, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Commission for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Commission will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information in the proceeding.

6. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of stamped confidential documents which a party has obtained under the terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

7. *Filing.* Stamped confidential documents need not be filed with the Commission's Secretary except when required in connection with motions under Sections 1.727 or 1.730 of the Commission's rules and regulations or other matters pending before the Commission. If filed, they shall be filed under seal and shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.

8. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 2(b) and (c) above.

9. *Prohibited Copying.* If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel so designating the document.

10. *Use.* Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and the conduct of this litigation (including appeals), and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.

11. *Non-Termination.* The provisions of this order shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, stamped confidential documents and all copies of same (other than exhibits of record, if any) shall be returned to the party or person which produced such documents, or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

12. *Modification Permitted.* Nothing in this order shall prevent any party or other person from seeking modification of this order or from objecting to discovery that it believes to be otherwise improper.

13. *Responsibility of Attorneys.* The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing at the Commission under seal.

14. This Order is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints &
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 6, 1993

Released: December 22, 1993

Mr. Richard D. Mills
Senior Port Commissioner
Port of Poulsbo
P.O. Box 732
Poulsbo, WA 98370

In reply, refer to:
315FE0082

Dear Mr. Mills:

This is in response to your October 28, 1993, letter requesting higher level review of the monetary forfeiture imposed for operating your marine utility coast station on a frequency not authorized under the terms of its station license and transmitting communications to other stations without proper station identification.

Your letter and the prior letter from your attorney present no new information that would merit further reduction or cancellation of the forfeiture. Assurances of future rule compliance, although meritorious, cannot be used to mitigate penalties for past violations.

However, the Commission has recently revised its policy regarding the assessment of forfeitures for violations of this type. *See Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on this new policy and the fact that we have no record of past violations of this type by your station, we are cancelling that portion of the forfeiture for failure to identify the station by its assigned call sign. For operating the station on a frequency not authorized under the terms of its station license, we are reducing the amount of the forfeiture to $200.

Accordingly, you are ordered to forfeit to the United States the sum of $200. This amount must be paid within 30 days of the date of receipt of this letter. Payment should be by check or money order made payable to the Federal Communications Commission and must be sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number 315FE0082 on the remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 22, 1993

CHEQUAMEGON TELEPHONE COOPERATIVE PETITION FOR WAIVER OF STUDY AREA DEFINITION OF PART 36 APPENDIX GLOSSARY AAD 93-160

Comments: January 14, 1994
Replies Comments: January 28, 1994

On November 17, 1993, Chequamegon Telephone Cooperative (Chequamegon) requested a waiver of the definition of study area as set forth in Part 36 of the Appendix-Glossary of the Commission's rules. Chequamegon acquired the Madeline Island Telephone Company (Madeline) and incorporated its plant and operations into Chequamegon's existing operations. This waiver would allow Chequamegon to amend its study area to include the former Madeline.

Parties may file comments on these petitions no later than **January 24, 1994**. Replies should be filed by **January 28, 1994**. Comments should reference AAD 93-160. A copy of each pleading should be sent to Pat Shipley, Common Carrier Bureau, 2000 L Street N.W., Suite 257, Washington, D.C., 20554, and to International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037, (202) 857-3800. Copies are also available from ITS.

For further information contact Pat Shipley at 202-632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-115

In the Matter of

Policies and Rules Concerning
Local Exchange Carrier Validation
and Billing Information for Joint
Use Calling Cards

Petitions for Waiver of Rules
Adopted in the *BNA Order*

SECOND ORDER ON RECONSIDERATION

Adopted: December 6, 1993; Released: December 7, 1993

By the Commission: Chairman Hundt not participating.

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I. INTRODUCTION AND BACKGROUND

1. On June 9, 1993, this Commission released the *BNA Order*,[1] which found that providing billing name and address information (BNA) is a communications common carrier service within the meaning of the Communications Act, which must be provided under tariff.[2] Accordingly, local exchange carriers (LECs) were required to file tariffs governing BNA provision for customers with listed telephone numbers on September 8, 1993. Tariffs governing BNA provision for unlisted and nonpublished subscribers are due February 9, 1994.[3] We also established a separate service category in Part 69 of the Commission's Rules, and created a separate rate element in the traffic sensitive basket for price cap purposes, but otherwise did not prescribe a specific BNA service rate structure within that separate rate element.[4]

2. The Commission also adopted several safeguards to protect the privacy interests of end users. Specifically, the Commission required LECs to notify all their end users that their BNA may be released to telecommunications service providers when: (1) the subscriber uses a LEC joint use card; or (2) the subscriber accepts a third party or collect call.[5] In addition to this notification requirement, the Commission also required LECs to obtain a one-time written authorization for BNA disclosure from existing and future LEC cardholders having nonpublished or unlisted numbers. For calling card calls, LECs were not permitted to release the BNA of any end user with an unlisted or

[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (*BNA Order*).

[2] *Id.* at 4481 (para. 16). BNA is the name and address provided to a local exchange company by each of its local exchange customers to which the local exchange company directs its bills for its services. *See* Section 64.1201(a)(1) of the Commission's Rules, 47 C.F.R. § 64.1201(a)(1).

[3] The *BNA Order* originally required LECs to file tariffs governing BNA provision for both listed and unlisted customers in September 1993, but later extended the deadlines for filing such tariffs for calling card customers with nonpublished or unlisted telephone numbers to February 9, 1994. Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, 8 FCC 6393 (1993) (*First BNA Reconsideration Order*) (*petition for recon. pending*).

[4] *BNA Order*, 8 FCC Rcd at 4482-83 (paras. 22-24).

[5] *BNA Order*, 8 FCC Rcd at 4486 (para. 39). LEC joint use calling cards bear account numbers supplied by a LEC, are used for the services of the LEC and an IXC, and are validated by access to data maintained by the LEC. *Id.* at 4478 n.5. A third party call is one for which the calling party requests the IXC to bill the call to a third party. As with collect calls, only the LEC serving the third party has access to the BNA information necessary to bill for the call. *Id.* at 4478 n.2.

nonpublished number until written authorization to do so was obtained from the subscriber. The LECs were also instructed to modify their line information database (LIDB) records to generate a "deny" response when queried about cards held by end users who had not authorized release of their BNA.[6]

3. On August 5, 1993, nineteen parties filed petitions for reconsideration of the *BNA Order*. Nine oppositions and eleven replies were filed.[7] For reasons discussed below, we grant the petitions for reconsideration in part and deny them in part.

4. In addition, on July 7, 1993, Pacific petitioned for waiver of the requirements to file BNA tariffs, or alternatively to cross-reference its intrastate BNA rates in its interstate tariffs.[8] Pacific also requested waiver of the requirements to obtain written authorization for BNA release from unlisted and nonpublished subscribers[9] and to modify LIDB to give a "deny" response when queried about cards of unlisted and nonpublished subscribers who have not authorized BNA disclosure.[10] Pacific has not met the standard for waiver of the Commission's Rules, which permits rules to be waived if there is "good cause" to do so.[11] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.[12] Nowhere in Pacific's waiver request does it allege special circumstances that would establish good cause for waiver of the rules. Accordingly, we deny Pacific Bell's waiver request.[13]

II. BNA TARIFFS

A. Tariffing Requirement

1. Title II Jurisdiction

5. *Background.* In the *BNA Order*, the Commission found that BNA provision is a service incidental to a communications service, specifically access service, within the meaning of Section 3(a) of the Communications Act.[14] We also determined that only LECs have the ability to provide BNA in a current, up-to-date form suitable for billing and collection, and should therefore be required to provide BNA on a common carrier basis under Section 3(h) of the Communications Act.[15] Accordingly, we concluded that LECs must file tariffs for BNA provision under Title II of the Communications Act.[16]

6. *Pleadings.* Bell Atlantic maintains that BNA is not incidental to a communications service because it is not transmitted at the time the call is completed.[17] Bell Atlantic also asserts that BNA is not "communications" within the meaning of the Communications Act simply because it is incidental to access service.[18] USTA contends that BNA is not a common carrier service because some LECs do not "hold out" BNA as a separate service.[19] Sprint argues that the LECs who choose not to "hold out" BNA as a service are usually the same as those who have not entered into billing and collection agreements, and that BNA is essential to make calling card validation services of any practical value to other telecommunications service providers (TSPs) who do not have billing and collection agreements with LECs.[20] Sprint also argues that the test for Title II jurisdiction is whether the service is incidental to a communications service, not whether LECs choose to hold the service out as a common carrier service.[21] NTCA assumes that our decision to tariff BNA is based on a conclusion that billing and collection is a common carrier service with monopoly characteristics.[22]

7. APCC argues that nondiscriminatory access to BNA enables customers to use their calling cards at more payphones, and therefore enhances competition in the interstate communications market.[23] Intelco and NTCA assert that the line number does not provide any market power to LECs because other card issuers may incorporate line numbers into account numbers.[24] Intelco and NTCA therefore conclude that BNA provision is not necessary to promote competition for interstate communications services, and that LECs should not be compelled to provide BNA as a common carrier service.[25]

8. In the *BNA Order*, we concluded that LECs should be required to hold out BNA as a common carrier service because only LECs have access to current, up-to-date BNA suitable for billing.[26] We also found unpersuasive US West's argument that there is a high correlation between current BNA suitable for billing and information printed

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[6] *BNA Order*, 8 FCC Rcd at 4486 (para. 40).

[7] A list of the parties filing petitions, comments, or replies, with abbreviations for each party, is found at Appendix A. US West's petition for reconsideration referred to an appendix which was not attached to its petition. US West filed this appendix as an erratum on August 26, 1993, and states that it served this erratum on all parties of record. US West Erratum at 1. We find that US West's late distribution of its appendix is unlikely to prejudice any other party in this proceeding, and accordingly, we will consider US West's appendix. On September 27, 1993, Zero Plus filed an untimely reply, accompanied by a motion to accept late-filed pleading. Zero Plus offers no explanation for its late-filed pleading, but claims that no party would be prejudiced by acceptance of Zero Plus's pleading. Although it is the policy of the Commission that extensions of time shall not be routinely granted, Section 1.46(a) of the Commission's Rules, 47 C.F.R § 1.46(a), we agree that its late-filed pleading will not prejudice any other party in this proceeding. Therefore, we will consider Zero Plus's reply.

[8] Pacific Waiver Petition at 2-4.

[9] *Id.* at 4-7.

[10] *Id.* at 8-9.

[11] Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[12] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[13] GTE also filed a petition for waiver of some of the rules adopted in the *BNA Order*. For reasons discussed below, we deny GTE's petition.

[14] *BNA Order*, 8 FCC Rcd at 4480-81 (para. 13); Section 3(a) of the Communications Act, 47 U.S.C. § 153(a).

[15] *BNA Order*, 8 FCC Rcd at 4481 (para. 16); Section 3(h) of the Communications Act, 47 U.S.C. § 153(h).

[16] *BNA Order*, 8 FCC Rcd at 4481 (para. 16).

[17] Bell Atlantic Petition at 8.

[18] *Id.* at 8 n.18.

[19] USTA Petition at 8.

[20] Sprint Comments at 5-6.

[21] Sprint Comments at 6.

[22] NTCA Petition at 8.

[23] APCC Comments at 3-4.

[24] NTCA Petition at 10-11; NTCA/Intelco Reply at 7-8.

[25] NTCA/Intelco Reply at 7.

[26] *BNA Order*, 8 FCC Rcd at 4481 (para. 16).

in telephone directories.[27] US West claims that the Commission has not refuted its assertion, and asserts that it conducted a survey which found an 83.3 percent correlation between the BNA of listed telephone customers and telephone book listings.[28] NTCA and Intelco argue that IXCs can collect BNA directly from customers, or use the LECs' billing and collection services.[29]

9. *Discussion.* We disagree with Bell Atlantic that BNA is not incidental to communications service simply because it is not transmitted at the time the call is completed. We have considered and rejected arguments that a service must be technically necessary for call completion to be treated as "incidental" to a communications service.[30] For similar reasons, "incidental" services do not necessarily involve transmission of information at the time the call is completed. As we explained in the *BNA Order*, current BNA information is a byproduct of exchange access service.[31] We also noted that the courts and the Commission have held that the Commission's jurisdiction under the Communications Act is to be construed broadly and expansively.[32] Thus, our jurisdiction is not limited to services in which information is transmitted at the time a telephone call is completed. Bell Atlantic is also mistaken in arguing that services incidental to access service are not incidental to communications services within the meaning of the Communications Act. We have found on several occasions that services incidental to access service fall within our jurisdiction.[33] Bell Atlantic has not provided a reason to reexamine these conclusions.

10. A number of petitioners argue that BNA should not be regulated under Title II because BNA is available from other sources.[34] While other sources of BNA exist, only LECs have the capacity to maintain complete, current BNA lists sufficient for billing and collection, a capability which is derived from the LECs' provision of exchange access service.[35] US West's study supports this conclusion. For example, US West found only an 83.3 percent correlation between its telephone directory listings and BNA information for its listed customers.[36] Thus, the directory listings of 16.7 percent of US West's listed customers would not be adequate for billing purposes. In addition, approximately 20 percent of US West's customers are unlisted and nonpublished,[37] and telephone directories are inadequate for billing these customers. Other LECs have a larger proportion of unlisted and nonpublished subscribers.[38] We conclude, as we did in the *BNA Order*, that BNA information adequate for billing and collection is available only from LECs.

11. Similarly, USTA contends that BNA is not a common carrier service because some LECs do not "hold out" BNA as a separate service.[39] The prong of the *NARUC* test for common carriage we used in the *BNA Order* was not whether an entity chooses to hold itself out as a common carrier, but rather whether it is or should be under a legal compulsion to do so.[40] We concluded in the *BNA Order* that LECs should be compelled to "hold out" BNA as a separate service because only LECs have the capacity to maintain current BNA lists adequate to use for billing and collection.[41] NTCA was thus incorrect in assuming that we based our conclusion that BNA is a Title II service on a determination that only LECs have the ability to issue line number based cards,[42] and has presented no reason to revisit our determination.

12. NTCA and Intelco argue that the Commission should address the LECs' refusal to have billing and collection contracts with some IXCs under the Title I authority the Commission retained in the *Billing and Collection Order*.[43] US West suggests using the Commission's Title I authority to require LECs to provide either billing and collection or BNA, arguing that this would be less disruptive to current billing practices.[44] We have previously rejected this approach as inadequate to assure provision of BNA on a nondiscriminatory basis under just, reasonable, and nondiscriminatory rates terms, and conditions.[45] NTCA, Intelco, and US West offer no new arguments to cause us to reconsider our prior determination.

2. Other Arguments

13. *Pleadings.* Some LECs contend that some customers will stop using LEC calling cards if they receive multiple bills.[46] Some parties also argue that subscribers may be inconvenienced or surprised if they receive a bill from a

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[27] *Id.* at 4481 (para. 17).

[28] US West Reply at 4-5 and App. A. *See BNA Order*, 8 FCC Rcd at 4481 (para. 17).

[29] NTCA Petition at 9-10; NTCA/Intelco Reply at 4-5.F

[30] *BNA Order*, 8 FCC Rcd at 4481 n.42; Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Report and Order, 7 FCC Rcd 3528, 3531-32 (para. 21) (1992) (*Validation Order*).

[31] *BNA Order*, 8 FCC Rcd at 4481 (para. 14).

[32] *See id.* at 4480 n.37, and cases cited therein.

[33] *See, e.g., id.* at 4480-81 (para. 13); *Validation Order*, 7 FCC Rcd at 3531 (paras. 18-19); Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 1423, 1426 (para. 26) (1993); Southwestern Bell Telephone Company, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, 8 FCC Rcd 2589, 2592 (paras. 11-12) (1993) (*Dark Fiber Discontinuance Denial Order*) (appeal pending).

[34] Bell Atlantic Petition at 7; NTCA Petition at 7-8; Intelco Petition at 4-8; US West Reply at 2-6.

[35] *BNA Order*, 8 FCC Rcd at 4481 (para. 16); *Validation Order*, 7 FCC Rcd at 3535 (para. 38); Cincinnati Bell Telephone Company, CC Docket No. 89-323, 6 FCC Rcd 3501, 3503 (para. 19) (*Cincinnati Bell Order*); *modified* 8 FCC Rcd 4409 (1993). We also reject the argument that BNA is not necessary if billing and collection services are available. First, the carrier may not want to purchase unregulated billing and collection services. Second, some LECs do not provide billing and collection services. Third, the requirement to provide regulated BNA services should not depend on the price levels of an unregulated service.

[36] US West Reply at 4.

[37] US West Petition at 13.

[38] *See, e.g.*, Pacific Petition at 5-6; Bell Atlantic Petition at 9.

[39] USTA Petition at 8.

[40] *BNA Order*, 8 FCC Rcd at 4481 (para. 15), *citing* NARUC v. FCC, 525 F.2d 630, 641, 642 (D.C. Cir. 1976), *cert. denied* 425 U.S. 992 (1976) (*NARUC I*); Norlight Request for Declaratory Ruling, 2 FCC Rcd 132, *recon. denied* 2 FCC Rcd 5167 (1987).

[41] *BNA Order*, 8 FCC Rcd at 4481 (para. 16).

[42] NTCA Petition at 10-11.

[43] NTCA Petition at 11-12; Intelco Petition at 9-10.

[44] US West Comments at 3.

[45] *BNA Order*, 8 FCC Rcd at 4482 n.60. *See also Validation Order*, 7 FCC Rcd at 3532 (para. 25) (eschewing Title I option in favor of Title II regulation of provision of validation and screening data).

[46] NTCA Petition at 2, 6; Intelco Petition at 22-24; GTE Petition at 3-4; US West Petition at 14 n.30; OPASTCO Reply at 4-5; NTCA/Intelco Reply at 5-7.

telecommunications service provider (TSP) for a call made with a LEC joint use card.[47] US West contends that customers would not be upset by an occasional separate bill, but might become upset if the practice became routine.[48] Bell Atlantic states that in its calling card advertisements it markets its calling card on the basis that a customer can have all calls billed on a single bill.[49] Intelco and NTCA speculate that some LECs will stop issuing cards if they are not permitted to be the exclusive billers, and that this would decrease competition in the calling card market.[50] NTCA alleges that multiple bills would harm IXCs who have entered into billing and collection agreements with LECs.[51]

14. APCC responds that there are some LECs who refuse to provide nondiscriminatory billing and collection to operator service providers (OSPs) and payphone providers who use store-and-forward technology.[52] APCC reasons that precluding customers from using certain payphones is a greater frustration of consumer choice than receiving more than one bill.[53] APCC notes that several LECs currently offer stand-alone BNA, and none of these LECs report customer confusion as a result of multiple bills.[54] LDDS contends that concerns regarding more than one bill per month are inconsistent with LEC claims that BNA demand will be minimal.[55] LDDS asserts that it is less expensive to use LEC billing and collection services than it is for IXCs to perform their own billing and collection, and so BNA is desirable only when LECs refuse to provide billing and collection.[56] LDDS and APCC observe that neither NTCA nor Intelco have provided any customer surveys to support their claims of customer opposition to receiving more than one bill.[57] Finally, LDDS and APCC note that LECs can ensure that their 0 9 customers receive a single bill by providing nondiscriminatory billing and collection services.[58] In reply to APCC, Bell Atlantic argues that the BNA tariffing requirements should be limited to LECs who withhold billing and collection services.[59] Bell Atlantic also alleges that it showed in its petition that calling card customers expect to be billed by the LEC.[60]

15. Various LECs question whether they should be required to file BNA tariffs, arguing there is very little demand for their contract-based BNA offering, either alone or as part of billing and collection.[61] Ameritech and Pacific argue that they have reasonably provided BNA under contract, and therefore should not be compelled to file BNA tariffs.[62] Several parties maintain that the costs of providing BNA cannot practically be recovered through BNA rates because of the low demand they expect.[63] Bell Atlantic and Intelco deny that TSPs "need" access to BNA because they may obtain billing and collection services from the LECs.[64] NTCA and Intelco claim that BNA tariffs are not necessary because IXCs have the option of not accepting LEC cards as payment.[65] Intelco and NTCA argue that IXCs who want to do their own billing can issue their own cards or accept a national bank credit card, and therefore BNA is not needed to promote competition for billing and collection.[66] LDDS notes that LECs are required to file tariffs for Title II services, and that all these arguments are irrelevant.[67]

16. Intelco compares calling cards to commercial credit cards, and asserts that customers do not expect to receive separate bills from companies where they have used their credit cards to purchase goods or services.[68] In response to Intelco, LDDS argues that calling cards are not analogous to commercial credit cards because TSPs are unable to provide service to calling card customers or to third party or collect customers without either billing and collection or BNA.[69]

17. *Discussion.* Several LECs contend that they should not tariff BNA because they expect little demand for the service, or because TSPs can rely on the LECs' billing and collection services. However, neither expected demand nor the existence of billing and collection services affect whether BNA provision is subject to Title II of the Communications Act, nor whether the service should be tariffed. With respect to suggestions that we require only those carriers who do not provide billing and collection services to all TSPs to file BNA tariffs, such a selective tariffing requirement would appear inconsistent with the decision of the U.S. Court of Appeals in *AT&T v. FCC*.[70] Furthermore, providing TSPs with BNA enables them to perform their own billing and collection, and creates another option for consumers of billing and collection services.[71]

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[47] Bell Atlantic Petition at 5; Intelco Petition at 7; OPASTCO Reply at 4; NTCA/Intelco Reply at 5.

[48] US West Comments at 4 and n.8.

[49] Bell Atlantic Petition at 5-7 and Att. A.

[50] Intelco Petition at 13-14; NTCA/Intelco Reply at 8.

[51] NTCA Petition at 3.

[52] APCC Comments at 2-3. APCC explains that store-and-forward technology enables payphone owners to provide operator services themselves through technology embedded in the payphone instrument. *Id.* at 2.

[53] *Id.* at 4.

[54] *Id.* at 5.

[55] LDDS Comments at 4-5.

[56] *Id.* at 5-6.

[57] *Id.* at 7; APCC Comments at 5.

[58] LDDS Comments at 7; APCC Comments at 5-6; APCC Reply at 3-4.

[59] Bell Atlantic Reply at 1-2. *See also* NTCA/Intelco Reply at 2-3. Similarly, USTA recommends requiring only LECs who issue joint use cards to file BNA tariffs, asserting that other LECs do not "hold out" BNA as a common carrier service. USTA Reply at 4-5.

[60] Bell Atlantic Reply at 1-2.

[61] NYNEX Petition at 6-7; Pacific Petition at 2-3; Southwestern Bell Petition at 2-3.

[62] Ameritech Petition at 3-4; Pacific Waiver Petition at 2-3. *See also* Zero Plus Reply at 4 (recommending waiving the requirements of the *BNA Order* for LECs providing billing and collection services.

[63] BellSouth Petition at 2; Bell Atlantic Petition at 10-11; Pacific Petition at 4; Pacific Waiver Petition at 3. *See also* USTA Reply at 5-6 (emphasizing the need for recovery of BNA costs by LECs under price cap regulation, and for rate of return and average schedule LECs).

[64] Bell Atlantic Petition at 7; Intelco Petition at 4-7.

[65] NTCA Petition at 7-8; Intelco Petition at 7-8.

[66] NTCA Petition at 9-10; Intelco Petition at 10-13.F

[67] LDDS Comments at 8, *citing* AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *cert granted*, 62 U.S.L.W. 3369 (November 30, 1993) (*AT&T v. FCC*).

[68] Intelco Petition at 7-8. *See also* OPASTCO Reply at 2-4.

[69] LDDS Comments at 7-8.

[70] *AT&T v. FCC*, 978 F.2d at 735-36.

[71] Intelco and NTCA allege that enabling TSPs to perform their own billing and collection will somehow preclude LECs

18. Some LECs argue that BNA tariffs may result in end users receiving separate bills for different services, and may create a competitive disadvantage for LECs by inducing some end users to obtain calling cards issued by IXCs or credit card companies. We continue to disagree with contentions that tariffing BNA generates any significant competitive disadvantage.[72] As APCC points out, BNA provision will enable subscribers to use their calling cards at more payphones than would be possible without BNA tariffs. This benefits both end users and TSPs by making more telecommunications services available at more locations.

19. We are also not persuaded that end users will necessarily be surprised or confused by receiving different bills for different telecommunications services. End users should be aware when the entity providing service is not the same as the entity issuing the calling card, because TSPs are required to identify themselves to the end user by the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).[73] In addition, TOCSIA and the Commission's Rules require a written announcement of the TSP's name, address, and telephone number posted on or near the payphone.[74] Furthermore, the *BNA Order* requires LECs to notify all their end users of the purposes to which BNA information will be put.[75] For these reasons, concerns regarding the competitive impact of BNA tariffs on calling cards seem highly speculative, and are not sufficient to outweigh the benefits to competition generated by making BNA available on a reasonable and nondiscriminatory basis.

20. Finally, Intelco's comparison between calling cards and commercial credit cards is not persuasive. As we discussed in the *Validation Order*, LECs treat failure to pay a calling card bill as a failure to pay for local exchange service, and thus may disconnect of local exchange service.[76] There is no comparable connection between nonpayment for calls billed to commercial credit cards and disconnection of local telephone service. Therefore, because, unlike calling cards, credit cards are not associated with local telephone service, customers' expectations regarding credit card billing do not cause us to reconsider our analysis of whether BNA provision should be tariffed.

B. Price Cap Treatment

21. *Background.* We directed price cap LECs to include BNA in the switched traffic sensitive basket when they incorporate BNA provision into their price cap indexes (PCIs).[77] We also established a new service category for BNA service in the switched traffic sensitive basket, because BNA access service is not sufficiently similar to any existing service to be included in an existing service category.[78]

22. *Pleadings.* Several petitioners contend that a separate service category unreasonably limits pricing flexibility established in the *LEC Price Cap Order*.[79] GTE argues that the revenues expected from BNA do not justify a separate service category.[80] Southwestern Bell also asserts that establishing a separate service category for BNA would require costly revisions to allocation systems, and that these new allocations would not be used to determine price levels.[81] Ameritech claims that each rate element in its tariff is unique, and so lack of similarity of BNA does not justify a separate service category.[82] NYNEX recommends that BNA be excluded from price cap regulation.[83] Alternatively, NYNEX recommends including BNA in 0 the Information Services category of the Traffic Sensitive basket.[84] If the Commission does not reconsider the price cap treatment of BNA, GTE requests a waiver to continue to provide BNA in local switching as it has since 1985.[85]

23. *Discussion.* In the *BNA Order*, we concluded that a separate service category for BNA is warranted because the demand characteristics of BNA access service are not sufficiently similar to any existing service to justify including BNA in an existing service category.[86] None of the petitioners has shown this conclusion to be incorrect. Ameritech's contention that dissimilarity does not justify a separate service category is inconsistent with the Commission's conclusions in the *LEC Price Cap Order* that certain services in the traffic sensitive basket are similar to each other, and need to be grouped into service categories to limit the LECs' ability to engage in anticompetitive practices.[87] Similarly, we conclude that low expectations of demand for BNA do not justify placing BNA in an existing service category because such placement would increase price cap LECs' ability to price BNA service unreasonably high. For these reasons, we find that BNA should be in a separate service category.[88]

24. We also conclude that GTE has not demonstrated that the waiver it seeks to continue to provide BNA in the local switching category is warranted. Courts have observed

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from competing in the billing and collection market. NTCA/Intelco Reply at 8. Nothing in the *BNA Order* in any way inhibits LECs from offering billing and collection services.

[72] *See BNA Order*, 8 FCC Rcd at 4481-82 (paras. 17-20).

[73] Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(b)(1); Section 64.703(a) of the Commission's Rules, 47 C.F.R. § 64.703(a). *See also* Policy and Rules Concerning Operator Service Providers, CC Docket No. 90-313, 6 FCC Rcd 2744 (1991), *recon.* 7 FCC Rcd 3882 (1992).

[74] TOCSIA, 47 U.S.C. § 226(c)(1); Section 64.703(b) of the Commission's Rules, 47 C.F.R. § 64.703(b).

[75] *BNA Order*, 8 FCC Rcd at 4486 (para. 39); Section 64.1201(e)(1) of the Commission's Rules, 47 C.F.R. § 64.1201(e)(1).

[76] *Validation Order*, 7 FCC Rcd at 3531 (para. 19).

[77] *BNA Order*, 8 FCC Rcd at 4483 (para. 23).

[78] *Id.* at 4483 (para. 24).

[79] Ameritech Petition at 4; NYNEX Petition at 7; GTE Petition at 8-9; GTE Comments at 9-10; US West Petition at 17-19; US West Erratum at Appendix 1.

[80] GTE Petition at 9-10; GTE Comments at 10.

[81] Southwestern Bell Petition at 8-9.

[82] Ameritech Petition at 4.

[83] NYNEX Petition at 8, *citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6813 (para. 222) (*LEC Price Cap Order*).

[84] NYNEX Petition at 8. *See also* US West Petition at 17-19 (does not oppose placing BNA in the Traffic Sensitive basket).

[85] GTE Petition at 9; GTE Comments at 10-11.

[86] *BNA Order*, 8 FCC Rcd at 4483 (para. 24), *citing LEC Price Cap Order*, 5 FCC Rcd at 6711 (para. 203).

[87] *LEC Price Cap Order*, 5 FCC Rcd at 6811 (para. 203).

[88] Some parties request exogenous treatment of the costs associated with BNA tariffs. SNET Petition at 5; Pacific Petition at 8; GTE Comments at 7-9; USTA Reply at 5-6. Requests for exogenous treatment are beyond the scope of this proceeding.

that "[a]n applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.[89] Circumstances that would justify grant of a waiver would include "considerations of hardship, equity, or more effective implementation of overall policy."[90] GTE cites no special circumstances that would prevent it from providing BNA in a separate service category. Nor has GTE made any showing that placing BNA in a separate service category would cause it undue hardship, or impair effective implementation of the Commission's policy objectives. In short, we find that GTE has failed to demonstrate "good cause" for its waiver request within the meaning of Section 1.3 of the Commission's Rules.[91] We therefore deny GTE's request.

C. Separations Issues

25. *Pleadings.* JSI requests that the Commission adopt Part 36 revisions to assign BNA investment and expenses directly to the interstate jurisdiction.[92] JSI expects BNA expenses will be recorded in Account 6620, Customer Operations Expense, and separated according to Section 36.378, Customer Services (Revenue Accounting).[93] According to JSI, absent a specific directive, these costs would be spread among all Category 2 subelements, or assigned to Other Billing and Collection.[94] JSI alleges that approximately 85 percent of these expenses are assigned to the intrastate jurisdiction, and that the Commission must obtain joint board approval for this result.[95] JSI also contends that applying Other Billing and Collection separation rules to BNA is inconsistent with the Commission's finding that BNA is a Title II service rather than detariffed billing and collection.[96] JSI recommends postponement of the BNA tariffs pending adoption of Part 36 revisions.[97]

26. *Discussion.* JSI is mistaken in assuming that our revisions to Section 69.307 would result in investment shifting from the interstate to the intrastate jurisdiction. Billing and Collection is not separated from regulated costs prior to the Part 36 Separations process, as are other non-regulated costs. Rather, Billing and Collection costs flow through Part 36, and the interstate portion of those costs are assigned to the deregulated billing and collection category. Because billing and collection costs are split from regulated costs in Part 69, after the Part 36 separations process, our treatment of billing and collection costs does not affect the amount of billing and collection assigned to the intrastate jurisdiction. Furthermore, the Part 69 cost allocation rules are applicable only to costs identified as interstate by the Part 36 rules. JSI has not explained how any Part 69 amendment assigning costs already designated as interstate to a new rate element could possibly affect the separations process. Therefore, JSI has not justified revising Part 36 to require direct assignment of BNA costs to the interstate jurisdiction.

27. However, to the extent JSI is correct that a portion of BNA expense will be recorded in Account 6620, another rule revision is required to allocate that expense to the BNA rate element. Accordingly, in this Order, we revise Section 69.407 of the Commission's Rules, 47 C.F.R. § 69.407, to assign a portion of Customer Operations Expense to the BNA rate element.

D. Other Tariffing Issues

1. Cross-Referencing

28. *Pleadings.* NYNEX and Pacific request permission to cross-reference their intrastate BNA rates in their interstate tariffs.[98] Pacific claims that many BNA customers do not separate interstate from intrastate calls, and that BNA demand might decrease if BNA users were required to do so.[99] Pacific is also concerned about "tariff shopping."[100]

29. *Discussion.* Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74, prohibits cross-referencing intrastate rates in interstate tariffs. In the absence of a waiver of Section 61.74, NYNEX's and Pacific's petitions for reconsideration must be denied. Furthermore, neither NYNEX nor Pacific have demonstrated good cause to waive Section 61.74, as required by Section 1.3 of the Commission's Rules. Pacific has not explained why it would be difficult or burdensome to devise some simple method for measuring relative intrastate/interstate demand. They have also not demonstrated why "tariff shopping" is more likely with BNA than it is for any other service where there is a dual interstate/intrastate tariffing scheme.[101]

2. Contract-Based BNA Service

30. *Pleadings.* Southwestern Bell assumes that LECs will be permitted to offer BNA for calling card, third party and collect calls under either contract or tariff after BNA tariffs take effect.[102] Southwestern Bell also assumes that BNA for other kinds of telephone calls, such as 900 service, will be available only under contract.[103] Southwestern Bell is concerned that some BNA purchasers may "shop" tariff and contract provisions, and recommends that the Commission permit all BNA services to be provided under contract.[104]

31. *Discussion.* Southwestern Bell is mistaken when it assumes that LECs are allowed to provide under contract BNA for calling card, third party, and collect calls. We found in the *BNA Order* that BNA provision is subject to the Commission's Title II jurisdiction, and we affirmed this

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[89] WAIT Radio v. FCC, 418 F.2d at 1157, *quoting* Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664 (D.C. Cir. 1968).

[90] *WAIT Radio*, 418 F.2d at 1159.

[91] Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[92] JSI Petition at 1-3. *See also* NTCA Petition at 17.

[93] JSI Petition at 5.

[94] *Id.* at 5-6.

[95] *Id.* at 6.

[96] *Id.* at 6-7.

[97] *Id.* at 7-8.

[98] NYNEX Petition at 6-7; Pacific Petition at 2-4; Pacific Waiver Petition at 3-4.

[99] Pacific Petition at 2-3.

[100] *Id.* at 4.

[101] *See also* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, 8 FCC Rcd 2863, 2868 (para. 30) (1993) (denying waiver petitions to cross reference intrastate tariffs containing international blocking services in interstate tariffs.)

[102] Southwestern Bell Petition at 9.

[103] *Id.*

[104] *Id.* at 9. *See also* Bell Atlantic Petition at 12 n.24 (assumes that BNA for purposes other than billing will be provided under contract, and expects TSPs to purchase BNA only under contract arrangements.)

finding above. Because BNA is subject to Title II, it is also subject to Part 69 of the Commission's Rules, which requires access services to be provided under tariff.[105]

III. LIMITS ON BNA DISCLOSURE

A. Restrictions on Bulk Transfers and Uses of BNA

32. *Background.* In the *BNA Order*, we defined the BNA required to bill for all calls placed within a specific time period as "periodic BNA," and we defined all the BNA in the LEC's records as "bulk BNA."[106] We permitted LECs wide latitude in developing periodic or per-call BNA offerings, to allow LECs flexibility to provide BNA in the form best suited to their facilities.[107] We also permitted purchasers of BNA to use it only for billing customers for using telecommunications services and collecting the amounts due.[108] However, we prohibited release of all the BNA in the LECs' records (bulk BNA) to minimize the risk of invading customers' privacy.[109] We did not preclude LECs from providing all the BNA associated with customers presubscribed to a particular IXC to that IXC.[110]

33. *Pleadings.* Several parties argue that BNA is used for several purposes related to equal access, as well as for maintaining IXC accounts, marketing IXC services, and preventing inadvertent unauthorized primary interexchange carrier (PIC) changes. Therefore, these parties contend BNA disclosure for these uses should not be prohibited.[111] US West asserts that this information is similar to the information provided to alternative directory publishers.[112] Similarly, BellSouth asserts that it has tariffed similar offerings at the intrastate level, and requests that the Commission permit it to continue to offer this service.[113] MCI asserts that direct marketing helps many IXCs compete against an entrenched IXC.[114] NYNEX and MCI claim that LECs provide BNA information on subscribers who are attempting to avoid payment of long distance bills by switching long distance providers.[115] MCI claims that BNA information helps IXCs to respond more effectively to customer inquiries regarding the identity of a called party. MCI estimates that such inquiries account for 10 percent of all service inquiries.[116] NTCA claims that the prohibition against bulk transfers appears to prohibit publication of white pages because the white pages disclose the names and addresses of all end users with listed telephone numbers.[117] NTCA also recommends that IXCs provide some kind of certification that they have completed the calls for which they seek BNA.[118]

34. MCI asserts that some petitioners read the definition of BNA too broadly. MCI notes that the *BNA Order* recognized a distinction between BNA and white pages information.[119] MCI requests that the Commission define BNA as "the billing name and address of a LEC customer that corresponds to a line or calling card account number associated with a specific call using the services of a telecommunications service provider."[120] Without this definition, MCI is concerned that LECs might stop sharing customer information necessary for order entry, customer service, fraud prevention, and identification of moving customers.[121] MCI argues that this definition would raise no privacy concerns because those customers are also customers of the TSP.[122]

35. NYNEX notes that there is a complaint pending before the Commission alleging that LECs should be required to disclose BNA information regarding payphone accounts to permit OSPs to compete to provide public telephone service, and interprets the *BNA Order* to preclude provision of this information.[123] According to Southwestern Bell, the *BNA Order* limits BNA disclosure to calling card calls, collect calls, and third party calls.[124] Southwestern Bell interprets this prohibition as precluding IXCs from obtaining BNA for 10XXX calls. Southwestern Bell also contends that IXCs have no source for BNA other than requesting that the caller provide BNA prior to completion of the call, and that BNA should be provided so that the customer would be spared this inconvenience.[125] Southwestern Bell presumes that the *BNA Order* was not intended to apply to such situations and continues to release BNA in all cases except "per call" requests for "stand alone" BNA service.[126]

36. US West argues that if customers give implied consent for BNA disclosure for billing purposes, they also give implied consent for BNA disclosure for other reasons. US West notes that, in 1978, the Commission found that subscribers give implied consent to emergency public 0 safety entities to record incoming calls.[127] US West argues that, when a customer uses the services of a TSP, it creates an "established business relationship" with that TSP within

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[105] *See* Section 69.1(b) of the Commission's Rules, 47 C.F.R. § 69.1(b).
[106] *BNA Order*, 8 FCC Rcd at 4485 (para. 34).
[107] *Id.* at 4485 (para. 37).
[108] *Id.* at 4485 (para. 33).
[109] *BNA Order*, 8 FCC Rcd at 4485 (para. 36).
[110] *Id.* at 4486 n.102; Section 64.1201(d)(2) of the Commission's Rules, 47 C.F.R. § 64.1201(d)(2).
[111] MCI Petition at 2-3; NYNEX Petition at 9-11; Southwestern Bell Petition at 5; US West Petition at 20-22; US West Comments at 8-9; Bell Atlantic Comments at 3; Sprint Comments at 2-3; MCI Reply at 1-2; US West Reply at 7-8.
[112] US West Petition at 21 n.44.
[113] BellSouth Comments at 2-3.
[114] MCI Petition at 4; MCI Reply at 2-3.
[115] NYNEX Petition at 10; MCI Petition at 3-4; MCI Reply at 2.
[116] MCI Petition at 4.
[117] NTCA Petition at 16 n.25.
[118] *Id.* at 14-16.
[119] MCI Comments at 1-2, *citing BNA Order*, 8 FCC Rcd at 4481 (para. 17).
[120] MCI Comments at 2. *See also* US West Comments at 10.
[121] MCI Comments at 2-3.
[122] *Id.*
[123] NYNEX Petition at 9-10, *citing* International Telecharge, Inc., d/b/a/ Oncor Communications, Inc. v. NYNEX Corporation *et al.*, File No. E-93-66.
[124] Southwestern Bell Petition at 3, *citing BNA Order*, 8 FCC Rcd at 4484 (para. 31).
[125] *Id.* at 3-4. *See also* US West Comments at 10-11.
[126] Southwestern Bell Petition at 6.
[127] US West Petition at 7-9, *citing* Use of Recording Devices in Connection with Telephone Services, Docket No. 20840, 67 FCC 2d 1392, 1399-1400 (para. 28) (1978) (*Beeptone Order*).

the meaning of the Telephone Consumer Protection Act of 1991.[128] Sprint also recommends eliminating the current restrictions on BNA usage.[129]

37. *Discussion.* The petitioners contend that permitting bulk disclosure of BNA is necessary to enable TSPs to engage in certain activities. MCI's solution is to redefine BNA so that the privacy protections are applicable only to BNA associated with calling card, collect, and third party calls. We decline to adopt MCI's BNA definition because we are not willing to create a large class of BNA information which BNA purchasers would be permitted to use without restriction. MCI has not shown that it is reasonable to permit BNA use for any purpose merely because the BNA information is not associated with a calling card, collect or third party call.

38. Nevertheless, we are persuaded that TSPs in the regular course of their business activities may need some BNA information in addition to BNA associated with calling card, collect, and third party calls. Specifically, we refer to the customer information necessary for order entry, customer service, fraud prevention, and identification of moving customers discussed by MCI. In the *BNA Order*, we balanced two competing concerns. We gave LECs flexibility to conform their BNA offerings to the legitimate needs of TSPs, while also giving substantial weight to customer privacy.[130] Based on the record in the *BNA Order* and this reconsideration proceeding, we find that there may be legitimate needs of TSPs that might be promoted by bulk BNA transfers, such as order entry, customer service, fraud prevention, and identification of customers who have moved from one location to another. Accordingly, we revise our rules to permit bulk disclosure.[131]

39. However, to help ensure that bulk BNA transfers do not lead to use of the information for marketing purposes, as was feared by commenters in the *BNA Order*,[132] we also reemphasize our prohibition against broad usage of BNA and limit its use. Specifically, we revise Section 64.1201(c) of the Commission's Rules, 47 C.F.R. § 64.1201(c), to permit BNA use for the limited purposes of order entry, customer service, fraud prevention, and identification of customers who have moved from one location to another.

40. We see no reason to permit BNA to be used for marketing purposes as US West suggests. In the *BNA Order*, our primary concern, and the concern of most of the commenters, was to prevent BNA from being used for marketing purposes to the extent possible.[133] Neither US West nor Sprint have persuaded us that this concern should not receive substantial weight. The *Beeptone Order* cited by US West is not relevant to the limitation on BNA usage adopted in the *BNA Order* because the BNA service is available in nonemergency situations. Therefore, we will not permit TSPs to use BNA for marketing purposes.

41. In addition, because lifting the restriction against bulk BNA disclosure increases the number of end users whose reasonable expectations of privacy are at risk, we also amend Section 64.1201(c) to prohibit all TSPs from disclosing BNA to any third party except governmental law enforcement agencies. Prohibiting further dissemination of BNA information should prevent end users' BNA from falling into the hands of telemarketing firms. We believe that our revisions of the bulk transfer and usage restriction rules strikes a reasonable balance between the privacy interests of end users and the needs of telecommunications service providers in conducting their businesses.[134]

42. Southwestern Bell interprets the BNA usage restriction too narrowly when it asserts that the restriction precludes TSPs from obtaining BNA for 10XXX calls. The rules adopted in the *BNA Order* permit BNA disclosure for all calling card, third party, and collect calls, regardless of whether the customers placing those calls used 10XXX dialing or some other dialing pattern. Therefore, the rule revision requested by Southwestern Bell is not necessary.

B. Limitations on Parties to Whom BNA May Be Disclosed

1. Enhanced Service Providers

43. *Pleadings.* ITAA and Compuserve maintain that Section 64.1201 unnecessarily blurs the distinction between basic and enhanced service providers.[135] ITAA and Compuserve note the Commission's finding in *Computer II* that enhanced services are not common carrier services and so should not be regulated.[136] ITAA is concerned that without clarification, state PSCs or foreign governments might use the *BNA Order* to justify applying common carrier regulation to ESPs.[137] Compuserve argues that ESPs should not become common carriers by virtue of obtaining BNA. Compuserve also requests that, if the Commission intends to treat BNA purchasers as common carriers, we revise our rules to prohibit ESPs from obtaining BNA.[138] ITAA argues that, because it is difficult to distinguish ESPs from non-ESPs, BNA should be available to all end users.[139] Alternatively, ITAA recommends making BNA available only to communications common carriers, or only to entities that have been authorized by a LEC to accept its calling card for purchase of goods or services.[140]

44. *Discussion.* The *BNA Order* did not in any way affect the distinction between basic and enhanced services, nor did it affect the regulatory status of enhanced services. The

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[128] *Id.* at 15-17, *citing* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227. *See also* Section 64.1200 of the Commission's Rules, 47 C.F.R. § 64.1200; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, 7 FCC Rcd 8752 (1992) (*TCPA Order*).

[129] Sprint Comments at 3.

[130] *BNA Order*, 8 FCC Rcd at 4485 (para. 37).

[131] In the *BNA Order*, Pacific maintained that bulk BNA disclosure might violate California law. *See BNA Order*, 8 FCC Rcd at 4485 n.94. Because we only permit rather than require bulk BNA disclosure, our rule revision does not prevent Pacific from complying with California law.

[132] *See BNA Order*, 8 FCC Rcd at 4485 (para. 35).

[133] *Id.* at 4485 (para. 33) and n.92.

[134] Privacy concerns regarding the use and disclosure of callers' telephone numbers are addressed in the Commission's proceeding on caller identification services. *See* Rules and Policies Regarding Calling Number Identification Service, Notice of Proposed Rulemaking, CC Docket No. 91-281, 6 FCC Rcd 6752 (1991).

[135] Compuserve Petition at 1-2, ITAA Petition at 3-4.

[136] ITAA Petition at 4-5; Compuserve Petition at 4-6.

[137] ITAA Petition at 5-7; ITAA Reply at 1-2.

[138] Compuserve Petition at 7-8.

[139] ITAA Petition at 7-10; ITAA Reply at 2-3.

[140] ITAA Petition at 10.

Commission concluded in *Computer II* that enhanced services are not common carrier services and are not subject to regulation under the Communications Act.[141] ESPs do not become common carriers subject to regulation simply because they have ordered BNA.

45. ITAA suggests making BNA available to all end users to avoid distinguishing between ESPs and non-ESPs. However, BNA provision does not make it more difficult for LECs to distinguish between ESPs and non-ESPs. Furthermore, in the *BNA Order*, we defined telecommunications service providers as IXCs, OSPs, ESPs, and any other providers of telecommunications services.[142] We also declined to permit BNA disclosure to parties other than telecommunications service providers and their authorized billing agents, because wider dissemination of BNA would contribute nothing to competition in the billing and collection market, but would increase the risk that end users' reasonable privacy expectations would be compromised.[143] ITAA has not shown that restricting BNA to telecommunications service providers is an unreasonable means of protecting these reasonable privacy expectations.

2. Competitive Access Providers

46. *Pleadings.* USTA recommends that LECs provide BNA only to entities who provide interstate common carrier transmission service other than access. USTA argues that, if its members are required to provide BNA to competitive access providers (CAPs), then CAPs must also give BNA to LECs.[144]

47. *Discussion.* The *BNA Order* requires LECs to provide BNA to all interstate telecommunications service providers. We conclude that this term includes competitive access providers. We also find that the issue of CAPs' BNA provision raised by USTA is beyond the scope of this reconsideration proceeding, and we will not consider it further here.

IV. EXPECTATIONS OF PRIVACY

A. Notification Requirement

1. Need for Notification

48. *Background.* In the *BNA Order*, we required LECs to notify their subscribers that their BNA will be disclosed to IXCs, ESPs, and independent service providers to facilitate billing for telecommunications services. In their notices to subscribers, the LECs must explain that the subscriber's BNA data will be released to an interstate service provider when (1) the subscriber uses a LEC joint use card; or (2) the subscriber accepts a third party or collect call.[145] LECs were directed to provide this notification to their listed customers by October 24, 1993, and to their unlisted and nonpublished customers by February 9, 1994.[146] In this section of the Order, we consider arguments raised by petitioners that it was inappropriate to require any customer notification. In the next section, we determine whether to modify the form of the notification in light of our revisions to the BNA usage restrictions and bulk transfer rules.

49. *Pleadings.* Southwestern Bell maintains that the Commission did not provide adequate notice and opportunity for comment prior to adopting the notification and authorization requirements.[147] According to US West, there is no evidence submitted by customers that they have privacy interests in BNA information.[148] NYNEX argues that notification is not necessary because there will be little BNA demand, and so there will be little BNA disclosure.[149] Southwestern Bell complains that providing notification to all their subscribers is disruptive to LECs with a large number of customers.[150] US West argues that the costs of notification and authorization are not warranted, because it assumes customers are aware of and give implied consent for BNA disclosure.[151] US West also contends that telephone customers with listed telephone numbers do not have any privacy interests in BNA information.[152] Rochester argues that customers can have no reasonable expectation that their BNA will not be used to bill their calls, and that the Commission's privacy protections in effect encourage customers to attempt fraud.[153]

50. *Discussion.* We conclude that it is necessary and appropriate to require LECs to provide some kind of notification to their subscribers regarding BNA. In the *BNA Order*, we required notification for two reasons. First, we wanted to be certain that each end user was aware that BNA would be released to permit billing for services charged to a LEC calling card, or on a third party or collect basis. Second, we believed that the notification would alleviate the concerns of some LECs that, in the case of calls billed to LEC joint use cards, end users would be surprised and confused by multiple bills for services charged to their calling card.[154] It is unclear whether a cardholder's use of a calling card can reasonably be treated as authorization for BNA disclosure or use unless the cardholder is on notice that BNA will be disclosed.[155] We found in the *BNA Order* that many consumers might be confused by receiving multiple bills for calls charged to their calling cards absent the notification requirement.[156] We conclude that providing this notification to consumers relieved some of this confusion, and therefore is in the public interest.[157]

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[141] Second Computer Inquiry, Final Decision, 77 FCC 2d 384 (1980); *modified on recon.* 84 FCC 2d 50 (1980); *further modified on recon.* 88 FCC 2d 512 (1981); *aff'd. sub nom.* Computer and Communications Industries Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982); *cert. denied* 461 U.S. 938 (1983).

[142] *BNA Order*, 8 FCC Rcd at 4478 n.3.

[143] *Id.* at 4484 (para. 31).

[144] USTA Petition at 9.

[145] *BNA Order*, 8 FCC Rcd at 4486 (para. 39).

[146] *First BNA Reconsideration Order*, 8 FCC Rcd at 6393 (para. 3).

[147] Southwestern Bell Petition at 7-8.

[148] US West Petition at 5-6.

[149] NYNEX Petition at 5-6.

[150] Southwestern Bell Petition at 6.

[151] US West Petition at 9-12, 13; US West Comments at 5-6. *See also* GTE Comments at 3-4.

[152] US West Reply at 3-6.

[153] Rochester Petition at 2-3. *See also* GTE Comments at 2.

[154] *BNA Order*, 8 FCC Rcd at 4486 (para. 39).

[155] *Id.*

[156] *Id.*

[157] USTA also requests that the notice requirement be applied only to LECs issuing joint use cards. USTA claims that, although the rules require all LECs to notify their customers, paragraph 46 of the *BNA Order* may be construed to limit the

51. Southwestern Bell has no basis on which to claim that there was inadequate notice or opportunity to comment prior to adoption of the notification and authorization requirements. In the Further Notice portion of the *Validation Order*, we specifically solicited comment on whether carriers should establish subscriber notification or authorization procedures before divulging BNA to third parties: "We also invite[d] commenters to address the following questions . . . Should carriers establish subscriber notification or authorization procedures before divulging BNA to third parties?"[158] We therefore believe that we provided sufficient notice that particular notification requirements might be adopted, and provided interested parties ample opportunity to advise on these requirements. In response, the commenters either supported or opposed adoption of notification or authorization procedures.[159] While no one discussed what those procedures should be, we believe the specific procedures we adopted are a logical outgrowth of the Further Notice portion of the *Validation Order's* discussion of notification and authorization requirements.[160]

52. US West suggested that we should discount the substantial evidence in the *BNA Order* proceeding that customers might be opposed to use of their BNA information for marketing purposes, simply because the evidence was not submitted by end users themselves, or because many customers have chosen to be listed in telephone directories.[161] However, numerous parties mentioned in the *BNA Order* agreed that BNA disclosure should not be permitted for marketing purposes, and only US West took a different position.[162] Two commenters submitted further support for this limitation on BNA disclosure in their petitions for reconsideration. Pacific claims that customers in its service region have unusually high expectations of privacy, and would be unlikely to authorize BNA disclosure to telecommunications service providers for billing purposes.[163] Intelco argues that customers do not give implied consent for BNA release, because customers expect to be billed for all their telephone calls on a single bill.[164] Finally, US West is not completely accurate in claiming that there was no evidence submitted by end users in the *BNA Order* because the State of California, speaking on behalf of its residents, opposed releasing BNA for marketing purposes.[165]

53. We did not adopt our privacy protection rules to facilitate fraud as Rochester suggests. We instructed LECs to reprogram LIDB to issue "deny" responses for customers who do not authorize BNA disclosure precisely to prevent the fraud that concerns Rochester.[166] When we reconsider the LIDB deny response requirement below, we will address Rochester's concerns regarding fraud prevention.[167]

2. Form of Notification

54. *Pleadings.* USTA requests that any LEC that complied with any part of the *BNA Order* prior to the release of the *First Reconsideration Order* not be required to comply again if the rules are revised, arguing that such compliance would be duplicative and confusing to customers.[168]

55. *Discussion.* In the *BNA Order*, we required LECs to notify their customers that their BNA may be disclosed for billing purposes whenever they place a calling card call or accept a collect or third party call.[169] In this Order, we allow BNA purchasers to use BNA information for certain limited purposes in addition to billing and collection, and BNA may be disclosed for these purposes even if the customer did not place a calling card call or accept a collect or third party call.[170] Thus, the notification required by the *BNA Order* is no longer accurate.

56. Nevertheless, we agree with USTA that requiring LECs to provide revised notification to their listed subscribers, who have already been notified regarding use and disclosure of their BNA, would be confusing to those customers. Furthermore, because these customers permit their BNA to be listed in public directories, they cannot reasonably object to the limited additional uses for BNA we are permitting in this Order. Accordingly, we find that the costs of requiring additional revised notification to listed customers are not warranted. With respect to unlisted and nonpublished subscribers, to whom carriers are not required to send notices regarding disclosure and use of their BNA until February 1994, however, we conclude that these customers should be notified that their BNA will be disclosed for billing and collection and the limited purposes we described above. On a going-forward basis, all new customers must be notified that their BNA may be disclosed to other TSPs.

B. Authorization Requirement

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notification requirement to LECs with joint use cards. USTA Petition at 6-7. To avoid USTA's confusion in the future, we correct the error in paragraphs 45 and 46 of the *BNA Order* by inserting the phrase "or carry third party or collect calls" after the phrase "local exchange carrier joint use calling cards as defined by this Order" wherever that phrase appears.

158 *Validation Order*, 7 FCC Rcd at 3539 (para. 59).

159 *See BNA Order*, 8 FCC Rcd at 4486 (para. 38), and comments cited therein.

160 Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983); Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

161 US West Petition at 5-6; US West Reply at 5-6.

162 *BNA Order*, 8 FCC Rcd at 4483 (para. 27 and n.76).

163 Pacific Petition at 5; Pacific Waiver Petition at 4-5.

164 Intelco Petition at 14-17.

165 *BNA Order*, 8 FCC Rcd at 4483 n.76.

166 *Id.* at 4487 n.109.

167 According to Intelco, it is impossible for customers to prevent unwanted marketing intrusions if BNA is provided under tariff and a TSP chooses to ignore the privacy protections adopted in the *BNA Order*. Intelco Petition at 19-20. Intelco also criticizes the Commission's reliance on the complaint process because subscribers would have recourse to the complaint process only after an intrusion has taken place. *Id.* at 20. Intelco's assumption that we rely exclusively on the complaint process to prevent unwanted disclosure of BNA information is unfounded because the Commission has authority to issue penalties to enforce our rules. *See* Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80. In any case, we believe our complaint process will deter most TSPs from violating our rules, and will permit us to deal with those few TSPs who do.

168 USTA Petition at 5-6.

169 *BNA Order*, 8 FCC Rcd at 4486 (para. 39).

170 *See* Section III.A. of this Order, *supra*.

1. Current Requirement

57. *Background.* We found in the *BNA Order* that end users with unlisted or nonpublished numbers may have privacy concerns greater than those of listed customers. Therefore, in addition to the notification requirement established above, we also required LECs to obtain a one-time written authorization for BNA disclosure from existing and future LEC cardholders with unpublished or unlisted numbers.[171] Because subscribers are given an opportunity to accept or reject charges to their line accounts for third party or collect calls prior to the completion of those calls and no BNA is released if the subscriber refuses the call, we concluded that it was not necessary to adopt a written authorization requirement for these calls.[172] In addition, in order to ensure that interstate service providers do not accept cards for which BNA will be unavailable, we required the LECs to modify their LIDB records to generate a "deny" response when queried about the cards of end users who had not provided authorization.[173]

58. *Pleadings.* Several petitioners contend that, while listed and unlisted subscribers have different expectations regarding BNA disclosure to the general public, they have the same privacy expectations with respect to BNA disclosure for billing purposes.[174] Ameritech claims that, in adopting special privacy protections for unlisted and nonpublished subscribers, the Commission has confused BNA with customer name and address, which is White Pages information.[175] NYNEX asserts that there is nothing in the record that would indicate that unlisted and nonpublished subscribers might object to BNA disclosure to TSPs whose services they use.[176] United argues that it defines "unlisted" and "nonpublished" in its telephone books and tariffs, and that it would be unreasonable for subscribers to have any other expectations of privacy regarding their BNA besides those commonly associated with those defined categories.[177] In its reply, Pacific states that it provided notification to both listed and unlisted customers that their BNA would be released for billing purposes, and claims that neither listed nor unlisted customers have objected.[178]

59. Many LECs also complain about the costs associated with training or hiring staff to handle incoming letters of authorization, or to answer subscribers' questions regarding authorization.[179] Pacific argues that requiring end users to send back a BNA authorization form places an unnecessary burden on them.[180]

60. The petitioners also assert that a large portion of their customers have calling cards and have unlisted or nonpublished numbers. These petitioners expect few of these customers to respond to requests for BNA authorization, and assert that these customers will be surprised and confused if this results in disabling their calling cards.[181] In response to our expectation that most calling card customers with unlisted or nonpublished numbers would not unreasonably withhold consent for BNA disclosure.[182] Pacific claims that customers in its service region have unusually high expectations of privacy, and would be unlikely to authorize BNA disclosure to TSPs for billing purposes.[183] Alternatively, Intelco argues that customers do not give implied consent for BNA release to TSPs, or TSP use of BNA, because customers assume they will be billed by the LEC.[184]

61. Several commenters contend that reprogramming LIDB to issue a "deny" response would preclude the subscriber from using the card for any call, because LIDB cannot at this time generate different kinds of deny responses.[185] These commenters estimate that it would take as much as one to two years to modify LIDB to issue different deny responses.[186] USTA contends that LIDB cannot distinguish between interstate and intrastate calls, and so the LIDB deny requirement might preempt state law.[187] Similarly, BellSouth maintains that LIDB cannot distinguish between calling card calls for which written authorization is required, and third party, collect, and 10XXX calls for which written authorization is not required.[188] Pacific estimates that other service providers honoring Pacific's calling cards might lose up to $93 million.[189]

62. Rochester and MCI argue that subscribers acquire cards with the expectation that they will be able to use them.[190] Integretel maintains that requiring a LIDB deny response is inconsistent with the results of the *Validation Order*, which requires LECs to give calling card validation information to IXCs on a nondiscriminatory basis.[191] US West argues that the costs of entering deny responses in LIDB for customers who have not authorized BNA disclosure are burdensome.[192] APCC is concerned that the repu-

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[171] *BNA Order*, 8 FCC Rcd at 4486 (para. 40).
[172] *Id.* at 4486 n.108.
[173] *Id.* at 4486 n.109.
[174] USTA Petition at 2-3; US West Petition at 12-13; Ameritech Petition at 5; Rochester Petition at 3; Integretel Petition at 3-4; Southwestern Bell Petition at 10-11; APCC Comments at 6-7; NECA Comments at 3; GTE Comments at 2; Zero Plus Reply at 2.
[175] Ameritech Petition at 5-6.
[176] NYNEX Petition at 4.
[177] United Petition at 2-4.
[178] Pacific Reply at 1-2.
[179] Southwestern Bell Petition at 6; USTA Petition at 4; SNET Petition at 3; NYNEX Petition at 5; Pacific Petition at 6; Pacific Waiver Petition at 6-7; NECA Comments at 2-3; US West Comments at 6.
[180] Pacific Reply at 2.
[181] BellSouth Petition at 2-3; USTA Petition at 3-4; Bell Atlantic Petition at 9; GTE Petition at 5; US West Petition at 13-15; Ameritech Petition at 6-7; SNET Petition at 3; NYNEX Petition at 4-5; Pacific Petition at 5-6; Pacific Waiver Petition at 5-6; Southwestern Bell at 6-7; Rochester Petition at 3-4; NTCA Petition at 2-4; GTE Comments at 3; LDDS Comments at 9-10; Sprint Comments at 1-2; Pacific Reply at 2-3.
[182] *BNA Order*, 8 FCC Rcd at 4487 (para. 40).
[183] Pacific Petition at 5; Pacific Waiver Petition at 4-5.
[184] Intelco Petition at 14-17. *See also* Bell Atlantic Comments at 1-2.
[185] Southwestern Bell Petition at 12; Rochester Petition at 4; BellSouth Petition at 2-3; USTA Petition at 4; Bell Atlantic Petition at 9-10; GTE Petition at 5; United Petition at 5-6; Ameritech Petition at 7; SNET Petition at 4-5; NYNEX Petition at 3 n.6; Pacific Petition at 7; Pacific Waiver Petition at 7; Intelco Petition at 21-22; NECA Comments at 3-4.
[186] Pacific Petition at 7-8; Pacific Waiver Petition at 7-8; Bell Atlantic Petition at 10; NYNEX Petition at 3; SNET Petition at 4.
[187] USTA Petition at 7-8.
[188] BellSouth Petition at 4-5.
[189] Pacific Reply at 4. *See also* Zero Plus Reply at 4.
[190] Rochester Petition at 2; MCI Comments at 3.
[191] Integretel Petition at 9-10.
[192] US West Comments at 6-7.

tation of independent payphone providers will suffer among customers whose cards are denied.[193] LDDS opposes the authorization requirement, but argues that if it is retained, it is also necessary to retain the "deny" requirement to avoid exacerbating problems created by unequal access to billing data.[194]

63. Bell Atlantic maintains that establishing different levels of protection for listed and unlisted customers, and for calling card calls and collect and third party calls, is confusing to customers and inconsistent with a prior Commission Order requiring Bell Operating Companies (BOCs) to provide BNA to ESPs as part of ONA.[195] Southwestern Bell asserts that establishing different protections for calling card calls and for third party and collect calls is based on an incorrect assumption that OSPs advise subscribers that their BNA may be disclosed if they accept the charges.[196] Southwestern Bell argues that it is unreasonable to permit disclosure of unlisted and nonpublished subscribers' BNA for PIC changes without prior authorization but not to permit such disclosure for billing.[197]

64. *Discussion.* Given the potential disruption described by the commenters, and the existence of less disruptive privacy protections for unlisted and nonpublished subscribers, we conclude that those protections should be revised. We discuss the revised privacy protections below.[198]

2. Revised Privacy Protections

65. *Pleadings.* Many parties contend that the privacy interests of both listed and unlisted subscribers are adequately protected by the BNA notification requirement, or by the Commission's Rules permitting BNA disclosure only to telecommunications service providers for billing purposes.[199] These parties maintain that the calling card customers voluntarily offer their cards as payment, and therefore provide the same kind of implied consent to BNA disclosure as subscribers who accept the charges for third party and collect calls.[200] A number of parties also note that IXCs are required to identify themselves prior to completing a calling card call, and permit customers to terminate the call before any charges are imposed.[201] APCC argues that customers concerned about BNA disclosure may use a proprietary IXC card.[202]

66. Southwestern Bell recommends delaying BNA tariffs until LIDB can be modified to issue different "deny" responses.[203] A number of commenters assert that modifying LIDB to provide different deny responses would be costly and time-consuming, and recommends eliminating the authorization requirement.[204] Pacific argues that some IXCs would object to treating LIDB queries from IXCs differently from LEC queries.[205] If the Commission concludes that additional protection for unlisted and nonpublished subscribers is necessary, United recommends assuming that customers give consent to BNA disclosure unless they inform their LECs otherwise, arguing that this is consistent with the Commission's CPNI rules.[206] GTE opposes this result because it would still require LECs to refuse to disclose the BNA of some customers.[207] SNET recommends that IXCs use the billing and collection services of the LECs.[208] APCC requests that the Commission reject any revisions to the *BNA Order* that would restrict the TSPs' ability to bill.[209]

67. GTE recommends that TSPs who perform their own billing advise their customers immediately following the time they "brand" their call as required by TOCSIA that the TSP will issue the bill.[210] GTE explains that this would enable customers to prevent BNA disclosure by hanging up immediately.[211] GTE also argues that this would prevent TSPs who do not use LIDB to validate calls from accepting a card for which BNA is not available.[212] LDDS opposes GTE's recommendation because TOCSIA has already addressed pre-call announcements. LDDS also asserts that an additional announcement would be costly and would create customer confusion.[213] Sprint contends that it cannot determine whether it will need BNA until after the call is completed and the billing process has begun.[214]

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[193] APCC Comments at 6.

[194] LDDS Comments at 10.

[195] Bell Atlantic Comments at 2, *citing* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 6 FCC Rcd 7646, 7667 (para. 44) (1991).

[196] Southwestern Bell Petition at 10.

[197] Southwestern Bell Petition at 11.

[198] USTA also requests that the definition of joint use card exclude line number-based cards and LECs who refer customers to IXCs for calling cards. USTA Petition at 6-7. LDDS, Sprint, and APCC oppose USTA's suggestion for definition of joint use card, arguing that the Commission has included RAO cards in the definition of joint use cards on several occasions, and USTA has not provided an adequate justification for revising this definition. Sprint Comments at 3-5; LDDS Comments at 11-12; APCC Reply at 3. We adopted the definition of joint use card in the *Validation Order*, 7 FCC Rcd at 3529 (para. 6). Therefore, this definition is outside the scope of this reconsideration proceeding, and we agree with LDDS, Sprint, and APCC that USTA has not provided an adequate justification for revising the definition of joint use card.

[199] SNET Petition at 2; Integretel Petition at 6-7; Southwestern Bell Petition at 11; GTE Comments at 4; APCC Comments at 7; US West Reply at 6-7. *See also* GTE Petition at 7. USTA and NECA suggest sending a specially worded notice to unlisted and nonpublished subscribers that being unlisted or nonpublished does not preclude BNA disclosure. USTA Petition at 3-5; NECA Comments at 4-5; USTA Reply at 2-4.

[200] BellSouth Petition at 4-5; United Petition at 4; US West Petition at 7-9; Ameritech Petition at 6; NYNEX Petition at 4; Pacific Petition at 4-5; Pacific Waiver Petition at 4-5; Integretel Petition at 4-5, 8; US West Reply at 6-7.

[201] US West Petition at 6-7; Ameritech Petition at 6; United Petition at 4-5, *citing* 47 CFR § 64.703.

[202] APCC Comments at 7.

[203] Southwestern Bell Petition at 11-12.

[204] Integretel Petition at 10; Bell Atlantic Petition at 10; GTE Comments at 5-7.

[205] Pacific Petition at 8 n.7.

[206] United Petition at 6-7, *citing Computer III Remand Order*, 6 FCC Rcd 7571 (1991). *See also* GTE Petition at 7-8; Bell Atlantic Comments at 3; Pacific Reply at 4; Sprint Reply at 1-2; Zero Plus Reply at 2-3, 5.

[207] GTE Comments at 4.

[208] SNET Petition at 5.

[209] APCC Reply at 4.

[210] GTE Petition at 5-6, *citing* Policy and Rules Concerning Operator Service Providers, CC Docket No. 90-313, 6 FCC Rcd 2744 (1991). *See also* NTCA Petition at 12-14; GTE Comments at 5.

[211] GTE Petition at 6-7.

[212] *Id.* at 7 n.11. *See also* US West Comments at 7-8.

[213] LDDS Comments at 10-11. *See also* APCC Reply at 1-3.

[214] Sprint Comments at 6-7.

68. *Discussion.* We conclude that end users should not bear the burden of returning an authorization form in order to continue to use their calling cards. At the same time, we are unwilling to adopt the petitioners' assumption that all unlisted and nonpublished subscribers, who have made the effort to become unlisted and nonpublished and pay a monthly fee for this service, have absolutely no objections to disclosure of their BNA to TSPs. Accordingly, we consider it important that these subscribers have a mechanism to prevent such BNA disclosure. Accordingly, we revise Section 64.1201(e) to allow disclosure of the BNA of any unlisted and nonpublished subscriber unless that subscriber affirmatively requests that its BNA not be disclosed. We also permit LECs to presume that unlisted and nonpublished end users consent to disclosure and use of their BNA if they do not make this affirmative request. LECs should also inform their unlisted and nonpublished customers that they have a right to request that their BNA not be disclosed, and advise those customers that the presumption in favor of consent for disclosure will begin 30 days after those customers receive those notices.[215]

69. In order to enable LECs to make these revisions to the notification they will provide to their unlisted and nonpublished subscribers, we revise the dates established in the *First BNA Reconsideration Order*. LECs will now be given until February 23, 1994, to provide notification and obtain authorization from their customers with nonpublished or unlisted telephone numbers for disclosure of their BNA information to interstate service providers. LECs are also required to file tariffs for the provision of the BNA information of calling card customers with nonpublished or unlisted telephone numbers no later than February 23, 1994, on 45 days' notice.

70. Several parties argue that the Commission has not justified treating calling card calls differently from third party and collect calls by requiring authorization only for BNA associated with calling card customers with unlisted and nonpublished numbers. These parties maintain that the calling card customers voluntarily offer their cards as payment, and therefore provide the same kind of implied consent to BNA disclosure as subscribers who accept the charges for third party and collect calls.[216] We agree that the act of offering a calling card as payment for a service is comparable to the act of accepting a third party or collect call, and therefore calling card calls and third party and collect calls should be treated the same. However, we cannot agree that it is reasonable to assume that customers with unlisted and nonpublished numbers consent to disclosure and use of their BNA information. As explained above, subscribers with unlisted and nonpublished numbers make a special effort to have their numbers unlisted and nonpublished, and pay a monthly fee for this service. Accordingly, the notice informing customers that they may prevent BNA disclosure should also inform customers that they may prevent BNA disclosure for third party and collect calls as well as calling card calls.

71. Zero Plus claims that many LECs offer toll restriction services that restrict collect or third party calls from being charged to an end user, and speculates without further explanation that end users who do not authorize BNA disclosure might be forced to give up this service.[217] We see no reason why granting or withholding consent for BNA disclosure should affect any end user's toll restriction service. Accordingly, LECs will not be allowed to treat lack of withholding consent for BNA disclosure as an indication that the customer no longer wants toll restriction service.

72. We also conclude that cardholders who request that their BNA not be disclosed should not be permitted to continue to use their calling cards. If a cardholder with an unlisted or unpublished number does not consent to BNA disclosure, telecommunications service providers to whom the card is presented will be unable to bill for charges to the card.[218] We share Rochester's concern that under these circumstances, TSPs may become susceptible to fraud.[219] Therefore, we will retain the requirement that LECs reprogram LIDB to issue "deny" responses for customers who affirmatively request that their BNA not be disclosed.[220]

73. We disagree with USTA that the LIDB deny response raises a preemption issue.[221] In the *BNA Order*, the Commission specifically declined to preempt any state law.[222] The Commission has not established any requirements for or restrictions on the provision of BNA for intrastate calls. In adition, it is not clear on this record that making modifications to LIDB to distinguish between intrastate and interstate calls would be prohibitively expensive. If facts later brought to our attention show that this is incorrect, we can further explore the preemption issue at that time. Thus, USTA's concerns regarding preemption do not necessitate reconsidering our requirement to place a "deny" response in LIDB.

V. MISCELLANEOUS ISSUES

A. Constitutional Issues

74. *Background.* In the *First Reconsideration Order*, we concluded that carriers may need additional time to comply with the notification and authorization requirements.[223] Accordingly, we stayed the deadlines for compliance with the requirements of the *BNA Order* pertaining to unlisted

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[215] LECs are required to file tariffs for the provision of BNA for unlisted and nonpublished customers on 45 days' notice. *First BNA Reconsideration Order*, 8 FCC Rcd at 6393 (para. 3). If a customer informs the LEC that it does not consent to BNA disclosure within 30 days of receiving notice, then the LEC should have adequate time to reflect the customer's nonconsent in its records. During this 30 day period, LECs will be permitted to disclose these customers' BNA.

[216] BellSouth Petition at 4-5; United Petition at 4; US West Petition at 7-9; Ameritech Petition at 6; NYNEX Petition at 4; Pacific Petition at 4-5; Pacific Waiver Petition at 4-5; Integretel Petition at 4-5, 8; US West Reply at 6-7.

[217] Zero Plus Reply at 3.

[218] *See BNA Order*, 8 FCC Rcd at 4487 n.109.

[219] Rochester Petition at 2-3. *See also* GTE Comments at 2.

[220] Choosing to modify LIDB as Southwestern Bell suggests, so that LIDB can issue distinctive "deny" responses, one for nonauthorization of BNA disclosure and one to indicate the credit status of the end user, would be useful to TSPs and consistent with Section 64.1201(e) of the Commission's Rules.

[221] *See* USTA Petition at 7-8.

[222] *BNA Order*, 8 FCC Rcd at 4487 (para. 41).

[223] *First BNA Reconsideration Order*, 8 FCC Rcd at 6393 (para. 2).

and nonpublished subscribers until February 9, 1994.[224] However, we determined that there was no need to modify the September 8, 1993, date governing the filing of tariffs for BNA associated with customers who have listed telephone numbers.[225] Because we revised several of the deadlines for compliance with the requirements of the *BNA Order*, we dismissed as moot in part petitions for stay of those deadlines then pending, including a petition filed by USTA jointly with US West and several other BOCs.[226]

75. *Pleadings.* US West complains that, because the *First BNA Reconsideration Order* did not stay the requirement to provide notification to listed customers, US West was denied an opportunity for "meaningful" reconsideration of this requirement.[227] US West asserts that its First Amendment right to freedom of speech has been violated. US West alleges it has suffered irreparable harm because it is compelled to speak (*i.e.*, notify customers) when it wishes to remain silent, and that such "speech" cannot be taken back later.[228] US West alleges it has suffered harm as a result of a violation of its right to refrain from "speaking," and distinguishes this harm from the harm alleged in the petitions for stay, which were the costs of providing notification.[229] US West claims it has a "right" to reconsideration, and requests the Commission to consider its petition for reconsideration by early December 1993.[230]

76. *Discussion.* We reject US West's claim that it was denied an opportunity for reconsideration of the *BNA Order*. The Commission has reconsidered the authorization requirement in this Order. With respect to providing notification to listed subscribers, we examined US West's arguments in the USTA/BOC joint petition for stay, and found that US West had failed to show that stay of this requirement of the *BNA Order* was warranted.[231] We did not consider US West's First Amendment argument in the *First Reconsideration Order* because US West raises it for the first time here. However, if US West had raised this argument in its petition for stay, for the reasons discussed below, it would not have warranted stay or reconsideration of the notification requirement in the *BNA Order*.

77. It is clear that the First Amendment right to freedom of speech includes the right to refrain from speaking.[232] It is equally clear, however, that the right to freedom of speech may be limited in certain circumstances to promote a government interest. In *Pacific Gas*, the United States Supreme Court held that the California Public Utilities Commission could not compel Pacific Gas and Electric to include in its bill inserts requests for donations or statements of opinions from a public interest group representing consumer interests during rate hearings. The Supreme Court held that it is unconstitutional to compel companies to propound political messages with which they disagree.[233] However, the Court also found that such political speech is "readily distinguishable from orders requiring appellant to carry various kinds of legal notices...."[234] The notification required in the *BNA Order* falls within the *Pacific Gas* exception.

B. Banking Regulations

78. *Pleadings.* Intelco asserts that when IXCs perform their own billing and collection they are effectively issuing an unsolicited credit card, which would conflict with requirements of the Truth in Lending Act and Regulation Z.[235] Intelco notes that the definition for "credit card" includes "any card, plate, coupon book, or other credit device."[236] Intelco insists that the *BNA Order* facilitates an "unrequested credit relationship" with the interstate service provider.[237]

79. *Discussion.* This is the third time this argument has been raised, and Intelco's restatement is no more persuasive now than it was previously.[238] It seems unlikely at best that a customer receiving more than one bill in association with a calling card can be construed to have received an "unsolicited credit card" within the meaning of the Truth in Lending Act or Regulation Z. Intelco observes that the definition of "credit card," in the Truth in Lending Act is "any card, plate, coupon book, or other credit device."[239] A separate bill does not appear to fall within the plain meaning of this definition. Our research has not revealed any court opinion or other authority to support Intelco's construction, nor has Intelco brought any authority to our attention.[240] In the absence of such authority, we reject Intelco's argument that the *BNA Order* is inconsistent with the Truth in Lending Act or Regulation Z.

VI. ORDERING CLAUSES

80. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the parties listed in Appendix A of this Order ARE GRANTED to the extent indicated above, and otherwise ARE DENIED.

81. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 1, 4, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§

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[224] *Id.* at 6393 (para. 3).

[225] *Id.*

[226] *Id.* at 6394 (para. 5). We also dismissed as moot petitions for stay filed by United and GTE, and we dismissed as moot in part and denied in part a petition for stay filed by U.S. Intelco. *Id.*

[227] US West Comments at 11-12. *See First BNA Reconsideration Order*, 8 FCC Rcd at 6393 (para. 3).

[228] US West Comments at 12-13.

[229] *Id.* at 13 n.36.

[230] US West Comments at 13-14, *citing* Section 405 of the Communications Act, 47 U.S.C. § 405; and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429.

[231] *First Reconsideration Order*, 8 FCC Rcd at 6394 (paras. 9-11).

[232] Pacific Gas and Electric v. California Public Service Commission, 475 U.S. 1 (1986) (*Pacific Gas*).

[233] *Pacific Gas*, 475 U.S. at 15-16.

[234] *Id.* at 15-16 n.12, *citing* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). *Accord* Central Hudson Gas and Electric v. Public Service Commission of New York, 447 U.S. 557, 565 (1980).

[235] Intelco Petition at 17-19, *citing* Truth in Lending Act, 15 U.S.C. § 1642, Regulation Z, 12 C.F.R. § 226.12.

[236] *Id.* at 18, *quoting* 15 U.S.C. § 1602.

[237] Intelco Petition at 19. *See also* NTCA Petition at 4-5.

[238] *BNA Order*, 8 FCC Rcd at 4486 n.107; *First Reconsideration Order*, 8 FCC Rcd at 6394-95 (para. 13).

[239] Intelco Petition at 18, *quoting* 15 U.S.C. § 1602.

[240] We have stated before that if our BNA rules conflict with any banking regulation, parties should bring it to our attention for resolution. *BNA Order*, 8 FCC Rcd at 4486 n.107; *First Reconsideration Order*, 8 FCC Rcd at 6394 (para. 13). As explained above, Intelco has not shown that any such conflict exists.

151, 154, and 201-205, Parts 64 and 69 of the Commission's Rules, 47 C.F.R. Part 64, 69, ARE AMENDED as set forth in Appendix B.

82. IT IS FURTHER ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, that In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) IS MODIFIED to reflect the revisions to the deadlines established in paragraphs 45 and 46 of that Order, as specified in paragraph 69, *supra*.[241]

83. IT IS FURTHER ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

84. IT IS FURTHER ORDERED that the provisions in this Second Order on Reconsideration will be effective 30 days after FEDERAL REGISTER publication.

85. IT IS FURTHER ORDERED that the petition for waiver of the *BNA Order* filed by Pacific Bell and Nevada Bell IS DENIED.

86. IT IS FURTHER ORDERED that the petition for waiver of the *BNA Order* filed by GTE Service Corporation IS DENIED.

87. IT IS FURTHER ORDERED that the motion to accept late filed pleading filed by Zero Plus Dialing, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

PLEADINGS

I. Petitions for Reconsideration

1. Ameritech Operating Companies (Ameritech)
2. Bell Atlantic Telephone Companies (Bell Atlantic)
3. BellSouth Telecommunications, Inc. (BellSouth)
4. CompuServe, Inc. (Compuserve)
5. GTE Service Corporation (GTE)
6. Information Technology Association of America (ITAA)
7. Integretel, Inc. (Integretel)
8. John Staurulakis, Inc. (JSI)
9. MCI Telecommunications Corporation (MCI)
10. National Telephone Cooperative Association (NTCA)
11. New York Telephone Company and New England Telephone and Telegraph Company y(together, NYNEX)
12. Pacific Bell and Nevada Bell (together, Pacific)
13. Rochester Telephone Corporation (Rochester)
14. Southern New England Telephone Company (SNET)
15. Southwestern Bell Telephone Company (Southwestern Bell)
16. United and Central Telephone Companies (United)
17. United States Telephone Association (USTA)
18. U.S. Intelco Networks, Inc. (Intelco)
19. US West Communications, Inc. (US West)

II. Comments

1. American Public Communications Council (APCC)
2. Bell Atlantic
3. BellSouth
4. GTE
5. LDDS Communications, Inc. (LDDS)
6. MCI

[241] *See* 5 U.S.C. § 553(d)(1).

7. National Exchange Carrier Association (NECA)

8. Sprint Corporation (Sprint) (Comments filed on behalf of United)

9. US West

III. Replies

1. APCC

2. Bell Atlantic

3. ITAA

4. MCI

5. NTCA and Intelco (Joint Reply)

6. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

7. Pacific

8. Sprint (Reply filed on behalf of United)

9. US West

10. USTA

11. Zero Plus Dialing, Inc. (Zero Plus)

APPENDIX B

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted.

2. Section 64.1201(a)(2) is revised to read as follows:

§ 64.1201 Restrictions on billing name and address disclosure

(a) * * *

(2) The term "telecommunications service provider" means interexchange carriers, operator service providers, enhanced service providers, and any other provider of interstate telecommunications services.

3. Section 64.1201(c) is redesignated Section 64.1201(c)(1), and is revised to read as follows:

§ 64.1201 Restrictions on billing name and address disclosure

* * * * *

(c)(1) No telecommunications service provider or authorized billing and collection agent of a telecommunications service provider shall use billing name and address information for any purpose other than the following:

(i) Billing customers for using telecommunications services of that service provider and collecting amounts due.

(ii) Any purpose associated with the "equal access" requirement of United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982).

(iii) Verification of service orders of new customers, identification of customers who have moved to a new address, fraud prevention, and similar nonmarketing purposes.

4. Section 64.1201(c)(2) is added to read as follows:

§ 64.1201 Restrictions on billing name and address disclosure

* * * * *

(c) * * *

(2) In no case shall any telecommunications service provider or authorized billing and collection agent of a telecommunications service provider disclose the billing name and address information of any subscriber to any third party, except that a telecommunications service provider may disclose billing name and address information to its authorized billing and collection agent.

5. Section 64.1201(d) is deleted.

6. Section 64.1201(e)(2) is revised to read as follows:

§ 64.1201 Restrictions on billing name and address disclosure

* * * * *

(e)(2) In addition to the notification specified in paragraph (e)(1) of this section, all local exchange carriers providing billing name and address information shall notify their subscribers with unlisted or nonpublished telephone numbers that:

(i) customers have a right to request that their BNA not be disclosed, and that customers may prevent BNA disclosure for third party and collect calls as well as calling card calls, and

(ii) LECs will presume that unlisted and nonpublished end users consent to disclosure and use of their BNA if customers do not affirmatively request that their BNA not be disclosed, and

(iii) the presumption in favor of consent for disclosure will begin 30 days after customers receive notice.

7. Section 64.1201(e)(3) is deleted, and new Section 64.1201(e)(3) is added to read as follows:

§ 64.1201 Restrictions on billing name and address disclosure

* * * * *

(e)(3) No local exchange carrier shall disclose the billing name and address information associated with any subscriber who has affirmatively withheld consent for disclosure of BNA information.

PART 69 -- ACCESS CHARGES

8. The authority citation continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154.

9. Section 69.407(c) is redesignated Section 69.407(d), and new Section 69.407(c) is added to read as follows:

§ 69.407 Revenue Accounting Expenses in Account 6620

* * * * *

(c) Revenue Accounting Expenses allocated to the interstate jurisdiction that are attributable to the provision of billing name and address information shall be assigned to the Billing Name and Address element.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and CRAIG O. MCCAW File No. ENF-93-44

APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL OF RADIO LICENSES

ORDER

Adopted: December 10, 1993; Released: December 13, 1993

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On December 6, 1993, Southwestern Bell Corporation ("Southwestern Bell") filed a motion requesting that the time for filing replies in the above-captioned proceedings be extended from December 15, 1993 to January 18, 1994. In the alternative, it asks the Commission to strike the pleading that American Telephone and Telegraph Company ("AT&T") and Craig O. McCaw (together "Applicants") filed on December 2, 1993, in opposition to its petition which seeks conditional approval or denial of the subject applications.

2. In support of its request, Southwestern Bell contends, in effect, that Applicants' December 2nd filing should be treated as an amended application that warrants the establishment of a new extended pleading cycle. According to Southwestern Bell, Applicants provided "a perfunctory and inadequate" public interest statement in their initial filings.[1] It faults them for having waited until December 2nd to submit substantial material and affidavits concerning the merger's competitive effects. Among other material noted in this connection, Southwestern Bell cites a 28-page report by Professor Lawrence Sullivan setting forth his views as to the relevant markets and competitive effects of the proposed AT&T-McCaw merger. Should its request for extension be denied, Southwestern Bell asks the Commission to strike Applicants' December 2nd filing. Relying on *Scripps-Howard Broadcasting*, 26 F.C.C.2d 824, 825 (1970), Southwestern H& Bell contends that accepting Applicants' filing without providing parties proper time to respond would contravene the Commission's policy not to condone the use of any pleading for other than the designated purpose.

3. Applicants promptly filed a joint opposition to Southwestern Bell's motion.[2] They contend that the motion constitutes "a baseless attempt to delay this proceeding and should be summarily denied."[3] Applicants further contend that the public interest showing in their applications provided all of the relevant affirmative factors upon which they rely in support of their application and all the information that any party needed to prepare comments. Moreover, Applicants contend that the public interest statement in their applications "was far more specific and detailed than those that Southwestern Bell and the other RBOCs have offered in the transfer applications that they have filed."[4]

4. On December 8, 1993, BellSouth filed comments in support of Southwestern Bell's motion and asked that the reply deadline be extended to January 18, 1994 for all parties filing replies. According to BellSouth, Applicants' December 2nd filing, including several hundred pages of exhibits and affidavits, contain "many mischaracterizations and misstatements of fact and law."[5] It contends that the size and scope of the proposed transaction and the complexity of the factual, legal, and policy issues warrant a careful development of disputed issues of fact. According to BellSouth, no prejudice to Applicants will occur by the requested extension of time "because the merger is not scheduled to close until August, 1994."[6]

5. It is the policy of the Commission that extensions of time shall not be routinely granted.[7] The issues raised in these proceedings are important and require expeditious examination and resolution. We find, however, that Southwestern Bell has shown good cause for the requested extension. In reviewing the circumstances of this proceeding, we agree with Southwestern Bell and BellSouth that all concerned and the public interest would have been better served if Applicants had made a more thorough showing in their initial application filings to support their conclusion that the public interest, convenience and necessity would be served by the Commission's approval of their proposed merger. In the interest of giving the parties to this proceeding a full and fair opportunity to present their claims, we will grant the requested extension.

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the time within which replies may be filed in this matter IS EXTENDED to January 18, 1994.

7. IT IS FURTHER ORDERED that this Order shall be effective upon adoption.

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[1] Motion of Southwestern Bell Corporation for an Extension of Time or, in the Alternative, to Strike, filed December 6, 1993, at 2.

[2] AT&T's and McCaw's Opposition to Southwestern Bell's Motion for an Extension of Time or, in the Alternative, to Strike, filed December 7, 1993.

[3] *Id.* at 1.

[4] *Id.* at 2.

[5] Comments in Support of Extension of Time for Filing Replies to AT&T-McCaw Opposition, filed December 8, 1993, by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc. ("BellSouth").

[6] *Id.* at 2.

[7] *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 20, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Clark, Robert V. - Request for refund of a hearing fee for a new FM station at Arkansas City, Kansas - **Granted** (November 10, 1993).

Guam Educational Radio Foundation - Request for withdrawal of the petition for refund of a filing fee for a FM station at Agana, Guam - **Granted** (November 22, 1993).

Hilding, Eric R. - Request for refund of a hearing fee for a new FM station at Windsor, California - **Denied** (November 10, 1993).

Johnson, Douglas R. - Request for refund of a hearing fee for a new FM station at Thousand Palms, California - **Granted** (November 10, 1993).

Lake Country Broadcasting Corporation - Request for reinstatement of an application for a new radio station at Perham, Minnesota - **Denied** (November 10, 1993).

Sauk Broadcasting Corporation - Request for acceptance of an application for a new FM radio broadcast station at Reedsburg, Winsconsin - **Granted** (November 23, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
NOV 10 1993

OFFICE OF
MANAGING DIRECTOR

John M. Burgett, Esq.
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Re: Robert V. Clark
Arkansas City, Kansas
Fee Control # 9211258170403001

Dear Mr. Burgett:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 22 1993

Thomas K. Crowe, Esquire
Irwin, Campbell & Crowe
1320 Eighteenth Street, N.W.
Suite 400
Washington, D.C. 20036

Dear Mr. Crowe:

Pursuant to section 0.231(c), your request to withdraw the petition for refund of the filing fee submitted on behalf of Guam Educational Radio Foundation, in connection with its application for a section 214 authorization, is granted. See 47 C.F.R. § 0.231(c).

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 10 1993

Mr. Eric R. Hilding
P.O. Box 1700
Morgan Hill, California 95038-1700

Dear Mr. Hilding:

This is in response to your request for refund of the hearing fee that you submitted in connection with your application for a new FM station at Windsor, California. You state that you are entitled to a refund because the construction permit for the station at Windsor was awarded without the need for a formal hearing.

Our review of this matter discloses that you and Ms. Judy Yep Hughes filed applications for the station, and that the Mass Media Bureau designated these applications for a comparative hearing. See Hearing Designation Order, 3 FCC Rcd 2495 (1993). In the course of the hearing, but prior to the taking of oral testimony, each party filed a motion for summary judgment with the presiding Administrative Law Judge (ALJ). Based on the merits of the pleadings, he awarded the construction permit to Ms. Hughes and denied your request. See Summary Decision, 8 FCC Rcd 5560 (1993).

Under the Commission's rules, a hearing fee will be refunded only pursuant to the criteria set forth in section 1.1111 of the Commission's rules. See Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 157 (1991), clarified, 6 FCC Rcd 3403 (1991). Moreover, Section 1.1111 of the rules provides that once competing applications are designated for hearing, a refund will be made only if a single applicant timely files a Notice of Appearance or the competing applicants timely submit a settlement agreement to the ALJ, and the ALJ grants the surviving application without recourse to adjudication. See 47 C.F.R. § 1.1111. Since you and Ms. Hughes did not avail yourselves of the Commission's settlement procedures, but rather resolved the selection of the permittee at Windsor through summary judgment adjudication by the presiding ALJ, you are not entitled to a refund of the hearing fee.

Accordingly, your request for refund is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 10 1993

Arthur V. Belendiuk, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

Re: Douglas R. Johnson
Thousand Palms, California
Fee Control # 9107178170292013

Dear Mr. Belendiuk:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
NOV 10 1993

OFFICE OF
MANAGING DIRECTOR

John Bullis, Esquire
301 Fifth Street South
Breckenridge, Minnesota 56520

Dear Mr. Bullis:

This is in response to your letter requesting reinstatement of an application filed by Lake Country Broadcasting Corporation (Lake), former applicant for a construction permit for a new radio station at Perham, Minnesota.

You state that Lake did not receive notice from the Commission that its hearing fee was due. Consequently, you contend that Lake's application should not have been dismissed for failure to timely submit its fee payment. See letter from Dennis Williams, Chief, FM Branch to John A. Brush, dated February 19, 1993.

Our review of this matter discloses that a Public Notice, released July 7, 1992, announced that mutually exclusive applications had been filed for the new station at Perham. The Public Notice required these applicants, including Lake, to submit their hearing fees by September 11, 1992 in contemplation of a comparative proceeding to select the appropriate licensee at Perham. When Lake failed to timely submit the fee, its application was dismissed.

We affirm the decision of the FM Branch. Hearing fees and other fee payments must be timely filed. Absent timely tendered fee payments, applications are subject to immediate dismissal. See 47 U.S.C. § 158(c)(2); 47 C.F.R. §§ 1.1107, 1.1114; see also Establishment of a Fee Collection Program, 2 FCC Rcd 947, 956-57 (1987). It was incumbent upon Lake to diligently prosecute its application by ascertaining and complying with any applicable deadline. See 47 C.F.R. § 73.3573(g). Since Lake failed to comply with the hearing fee deadline, its application was properly dismissed.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 23 1993

Jerrold D. Miller, Esquire
Miller & Miller, P.C.
1990 M Street, N.W.
Suite 760
Washington, D.C. 20036

Dear Mr. Miller:

This is in response to the Petition for Acceptance of Application Nunc Pro Tunc that you filed on behalf of Sauk Broadcasting Corp. (Sauk), applicant for a new FM station at Reedsburg, Wisconsin. An opposition to your petition has been filed by Frederick W. Kinlow, d/b/a F.W.K. Broadcasting Company (FWK), a competing applicant for the new station, and you have filed a response.

You state that Sauk timely submitted its application and fee payment together with a transmittal letter stating that the application constituted a request to construct a new FM station. However, the Fee Section returned Sauk's application as defective because Sauk failed to insert on its FCC Form 301, the Commission's fee code, specifying the type of authorization requested. Upon receipt, Sauk inserted the correct fee code and returned the application to the fee section. However, the window had closed for filing applications for the station at Reedsburg.

FWK states that Sauk's petition should be denied because, in its view, the Commission's admonition that it would dismiss applications filed without an FCC Form 155 or containing an incorrect fee code clearly contemplates dismissal of an application containing no fee code. Establishment of a Fee Collection Program, 2 FCC Rcd 947 (1987), recon. 5 FCC Rcd 3558, 3569-70 (1990).

We will grant Sauk's petition. The Commission adopted the fee code requirement in order to streamline the efficiency of its fee collection program,and, thereby, speed the processing of applications and other filings. See 5 FCC Rcd 3568-70. In administering the program, we have recognized that inadvertent errors in the entry of fee codes will occasionally occur. We are, of course, concerned that the process remain as efficient as possible. However, we do not believe that errors involving the entry of fee codes on the Form 155 are of such an egregious nature as to warrant dismissal of the underlying application or other filing. Cf. Processing Procedures for Commercial FM Broadcast Applications, 7 FCC Rcd 5074 (1992).

Therefore, we have concluded that a fee code error per se does not warrant dismissal of an application. See letter to Mr. Robert Ladd from Marilyn J. McDermett, dated October 8, 1991; see also letter to Louis Gurman from Marilyn J. McDermett, dated May 10, 1991. However, this conclusion should in no way be construed as modifying the Commission's rule that

applications submitted with a fee payment of less than the required amount will be returned. See 47 C.F.R. § 1.1114. Any application, including those submitted with an incorrect fee code, will be dismissed if the fee payment accompanying the application is insufficient.

Accordingly, Sauk's petition is granted and its application will be reinstated nunc pro tunc.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

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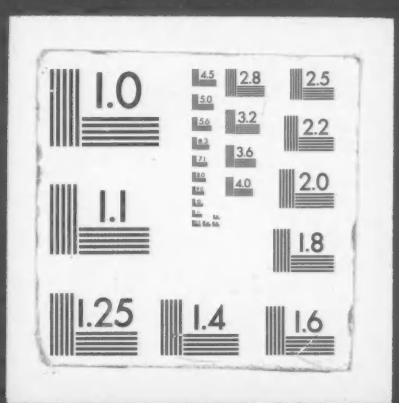
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